EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

PUBLISHER'S NOTE:

ORIGINAL PAGINATION IS NOT CONTINUOUS.

SUPREME COURT NO.: 97-5310

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

APPENDIX TO

Petition for Writ of Certiorari to the Supreme Court of the State of Florida

DOCUMENTS REQUIRED UNDER RULE 14.1(i)

Co-Counsel:
James A. Bonfiglio, Esq.
P.O. Box 1489
Boynton Beach, Fla., 33425
Florida Bar No.: 288055
Telephone No.: (561) 734-4503
Facsimile: (561) 734-1872

Attorney of Record:
Richard W. Glenn, Esq.
Florida Bar No.: 252395
Beverly & Tittle
823 N. Olive Ave.
West Palm Beach, FL 33401
Telephone: (561) 655-4603
Facsimile: (561) 659-6044

SUPREME COURT NO.:

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1997

DAVID R. BEACH and LINDA M. BEACH, his wife,

Petitioners,

vs.

GREAT WESTERN BANK, a Federal Savings Bank, a United States Corporation, f/k/a GREAT WESTERN SAVINGS,

Respondents.

SUPREME COURT NO.:

---

1. Final Judgment of Foreclosure
2. Opinion of 4th District Court of Appeal with Mandate
3. Opinion of Florida Supreme Court with Mandate

Co-Counsel
James A. Bonfiglio, Esq.
P.O. Box 1489
Boynton Beach, Fla., 33425
Florida Bar No.: 288055
Telephone No.: (561) 734-4503
Facsimile: (561) 734-1872

Attorney of Record:
Richard W. Glenn, Esq.
Florida Bar No.: 252395
Beverly & Tittle
823 N. Olive Ave.
West Palm Beach, FL 33401
Telephone:(561) 655-4603
Facsimile:(561) 659-6044

IN THE CIRCUIT COURT OF THE 15TH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR PALM BEACH COUNTY.

CASE NO. CL-92-6071-AG

GREAT WESTERN BANK, formerly GREAT WESTERN SAVINGS,

Plaintiff,

vs.

DAVID R. BEACH and LINDA M. BEACH, his wife,

Defendants.

---/

FINAL JUDGMENT OF FORECLOSURE

THIS MATTER came before the court for trial without a jury on October 20, 1993. After the presentation of testimony, review of the documentary evidence, hearing argument of counsel and being duly advised in the premises, the court makes the following findings of fact:

1. On December 4, 1985, DAVID AND LINDA BEACH (the "BEACHES"), closed on a construction loan with Fidelity Federal Savings Bank of Florida.

2. The funds were to be used to build a home on a vacant lot they had purchased in Jupiter on June 22, 1981.

3. On August 15, 1986, the BEACHES entered into a consumer credit transaction with GREAT WESTERN BANK ("GREAT WESTERN") in order to satisfy the construction loan from Fidelity Federal and to provide permanent financing for the acquisition of their home.

4. The BEACHES received numerous documents at closing, including a Federal Truth-in-Lending Act ("TILA") Disclosure Statement, a Closing Statement, a Three Day Notice of Right to Cancel, a VRM II T-Bill Rate Disclosure Statement, a Special VRM Notice, an Itemization of Amount Financed, a Good Faith Estimate of the Itemization of the Amount Financed, a Good Faith Estimate of the Truth-in-Lending Disclosure Statement and other disclosure documents.

5. Due to the variable rate feature of the note, GREAT WESTERN changed the interest rate on a yearly basis.

6. On December 1, 1991, the BEACHES defaulted on the loan by failing to make payment on the note.

7. Previously, the BEACHES had made $52,376.71 in payments and late charges to GREAT WESTERN.

8. The parties have stipulated that as of October 20, 1993, the BEACHES owe GREAT WESTERN $116,801.77.

9. GREAT WESTERN initiated foreclosure proceedings and the BEACHES asserted, as an affirmative defense, that GREAT WESTERN violated TILA.

10. The Notice of Right to Cancel form given to the BEACHES was the incorrect form.

11. The distribution of the wrong form to the BEACHES was the result of an unintentional bona fide error which did not constitute an error of legal judgment with respect to Plaintiff's obligations under the Truth-in-Lending Act.

12. In accordance with the testimony of Cindy Newman, Plaintiff maintained procedures reasonably adapted to avoid the distribution of incorrect rescission forms.

13. The BEACHES did not seek to rescind the GREAT WESTERN mortgage until after the institution of this foreclosure action.

ISSUES PRESENTED

A. Whether GREAT WESTERN has violated the Truth-in-Lending Act by failing to make the proper disclosures to the BEACHES when they consummated the August 15, 1986 loan.

B. What remedies are available to the BEACHES for any violations of the Federal Truth-in-Lending Act?

LEGAL ANALYSIS

A. Whether GREAT WESTERN Violated TILA by Failing to Make the Proper Disclosures to the BEACHES When They Consummated the August 15, 1986 Loan?

(1) More Conspicuous Rule.

15 U.S.C. §1632(a) provides as follows: "The terms annual percentage rate and finance charge shall be disclosed more conspicuously than other terms, data, or information provided in connection with a transaction, except information relating to the identity of the creditor." The BEACHES allege that GREAT WESTERN violated this subsection because it "used the same or smaller print size, style type and boldness for APR and FC as it did for "your initial contract rate is", "means estimate" and other typed in language." Although the print size, style type and boldness of the

numbers themselves appear to be the same as other disclosures on the TILA statement, both the APR and FC are surrounded by a large bold box that sets these items apart from the other disclosures. The boxes are printed in bolder print than the boxes surrounding the amount financed and total of payments. In Flesher v. Household Finance Corp., 640 F.2d 861, 862 (6th Cir. 1980), the Sixth Circuit held that the lender did not violate TILA by highlighting the APR and FC in such a manner:

> We agree with the District Court that HFC complied with the Act by putting the "finance charge" and the "annual percentage rate" in a box with a heavy black line. The highlighting of the "annual percentage rate" and the "finance charge" by placing them in black boxes, constitutes a clear and conspicuous disclosure of such terms. Frank v. Reserve Consumer Discount Co., 398 F.Supp. 703 (W.D. Pa. 1975). (Emphasis added).

The cases cited by the BEACHES are distinguishable because the APR and FC were not printed more conspicuously than the other terms. In this case, the fact that the APR and FC were each in a box with a heavy black line and that these boxes with heavy black lines were not used with any of the other disclosures, made the APR and FC "more conspicuously" disclosed than the other terms of the loan. Therefore, this Court finds that GREAT WESTERN did not violate the "more conspicuous" rule.

(2) Initial Contract Interest Rate Disclosure

GREAT WESTERN placed the symbol "++" next to the APR disclosure of 8.82%. Underneath the FC box, GREAT WESTERN made the following disclosure: "++ YOUR INITIAL CONTRACT RATE IS 8.750%."

The BEACHES argue that, by placing the "++" in the federal box and typing in "YOUR INITIAL CONTRACT RATE IS 8.75%" immediately below that, but outside the federal box, GREAT WESTERN violated the segregation requirement found in §226.17(a)(1) of Regulation Z which states as follows:

> The creditor shall make the disclosures required by this subpart clearly and conspicuously in writing, in a form that the consumer may keep. The disclosures shall be grouped together, shall be segregated from everything else, and shall not contain any information not directly related to the disclosures required under §226.18.

In In re: Cook, 76 B.R. 661 (Bankr. C.D. Ill., 1987), the Illinois court stated that §226.17(a) contains two requirements:

> First, the disclosures must be made clearly and conspicuously, and second, the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures.

Because the required disclosures have been made clearly and conspicuously, the crux of the BEACHES' argument is that the second requirement of §226.17(a), that "the disclosures must be grouped together, be segregated from everything else and not contain any information not directly related to the required disclosures" has not been met.

The Official Staff Commentary to §226.17(a)(1)-4 contains the following comment on the segregation rule:

> Content of segregated disclosures. Footnotes 37 and 38 contain exceptions to the requirement that the disclosures under §226.18 be segregated from material that is not directly related to those disclosures. Footnote 37 lists the items that may be added to the segregated disclosures, even though not directly related to those disclosures. Footnote 38 lists the items required under §226.18 that may be deleted from the

> segregated disclosures and appear elsewhere. Any one or more of these additions or deletions may be combined and appear either together with or separate from the segregated disclosures ... (Emphasis added).

Thus, according to this comment, as well as Cook and the plain language of §226.17(a)(1), §226.17(a)(1) does not mandate that the disclosures required by §226.18 be segregated from all other information. Material that is directly related to the disclosures can be included with the disclosures.

The initial contract rate is clearly directly related to the annual percentage rate of the loan. The annual percentage rate is a function of the initial contract rate and the subsequent changes in the initial contract rate. Additionally, the initial contract rate was not listed in the federal box next to the annual percentage rate. If it was, it could confuse and mislead the borrower. The initial contract rate is set apart from the APR and located under the APR federal box. The only extraneous figure in the federal box is "++" which is a reference to the initial contract rate. Furthermore, in In re: Jones, 79 B.R. 233, 236 (Bankr. E.D. Pa., 1987), the court held that the inclusion of an extraneous figure, "$4,105.00", did not entitle the debtor to damages or rescission under TILA:

> In order to successfully assert a TILA claim for damages, whether in the nature of recoupment or otherwise, TILA violations in the disclosure statement must be among those enumerated in 15 U.S.C. §1640(a)(3). In order to give rise to a right to rescind, violations of the TILA must appear in the notice of the rescission right itself or must constitute a "material violation" of the TILA, as defined in 15 U.S.C. §1602(u) ...

> The third asserted violation, the inclusion of the extraneous figure in the "federal box" in purported violation of 12 C.F.R. §226.17(a), was factually disputed by the lender, who claims that the extraneous figure, the recitation of the $4,105.00 net figure which the debtor received, appeared only in an internal copy of the disclosure statement retained by the lender and not on the significant copy, i.e., the one delivered to the Debtor. Putting aside the factual issue of whether the $4,105.00 figure appeared on the debtor's copy or not, an issue which we cannot resolve on this record, it is apparent that the appearance of this figure, at most a technical violation of 12 C.F.R. §226.23(a), would not be within the scope of 15 U.S.C. §1640(a)(3) or 12 C.F.R. §226.23(a)(3).

Finally, the three cases cited by the BEACHES in support of their argument, Mason v. General Finance Corp., 542 F.2d 1226 (4th Cir. 1976); In re: Orr, 697 F.2d 1011 (11th Cir. 1983); and Friend v. Termplan, 651 F.2d 1012 (5th Cir. 1981); are distinguishable from the instant case because (1) those cases are inapplicable since they were decided before TILA was amended by the Truth-in-Lending Simplification and Reform Act of 1980, and (2) the cases involved state terms which were inconsistent and incompatible with the federal disclosures mandated by TILA. In this case, "Initial Contract Rate" is not a term required by Florida law to be disclosed on the disclosure statement and it is not inconsistent with the APR so as to confuse or mislead the consumer. GREAT WESTERN might have violated TILA if it had used the term "Contract Rate" rather than "Initial Contract Rate". Cook, although a post-simplification case, is also distinguishable from the instant case because that case involved the failure of the lender to clearly and conspicuously disclose a security interest in a car and to

segregate this information in the federal box. Cook did not involve a situation where information required by TILA was clearly and conspicuously disclosed in the federal box and other information not required by TILA was listed outside the federal box. Therefore, this Court finds that GREAT WESTERN did not violate TILA when it disclosed the initial contract rate on the TILA disclosure statement.

(3) Annual Percentage Rate, Finance Charge, Amount Financed, Total of Payments and Payment Schedule

Both parties agree that GREAT WESTERN misstated the APR by 0.035%, the finance charge by $201.84, the total of payments by $201.84, and the 348 payments in the payment schedule by 58 cents each. GREAT WESTERN argues that these misstatements did not violate TILA because they are all related to the misstatement of the APR and the deviation in the APR is within the tolerable limits allowed by TILA. 15 U.S.C. §1606 explains that TILA permits a deviation in the APR of 0.125%:

> The disclosure of an annual percentage rate is accurate for the purpose of this title if the rate disclosed is within a tolerance not greater than one-eighth of 1 per centum, more or less than the actual rate or rounded to the nearest one-fourth of 1 per centum. The Board may allow a greater tolerance to simplify compliance where irregular payments are involved.

Because the APR is misstated by only .03%, and 15 U.S.C. §1606 permits a tolerance of .125%, the APR disclosure is accurate.

However, footnote 41 to Regulation Z, §226.18(d) indicates that the finance charge disclosure is not accurate:

> The finance charge shall be considered accurate if it is not more than $5.00 above or below the exact finance charge in a transaction involving an amount financed of $1,000.00 or less, or not more than $10.00 above or below the exact finance charge in a transaction involving an amount financed of more than $1,000.00. (Emphasis added)

In this transaction, the finance charge is misstated by $201.84. In Steele v. The Ford Motor Credit Co., 783 F.2d 1016 (11th Cir. 1986), Ford understated the finance charge by $24.00. The 11th Circuit held that this understatement constituted a material violation of TILA and that the consumer could rescind the loan:

> Ultimately, however, whether the understatement was $24.00 or $32.00 is of no consequence. An examination of our precedents reveals that in this circuit any understatement of the finance charge is a material non-disclosure, although the possibility of a de minimis exception has not been ruled out ...
>
> . . . . .
>
> We believe that Bustamante, Harris and Davis, may be read consistently with each other for the proposition that any understatement of the finance charge is material because any understatement would be of some significance to a reasonable consumer. Although this proposition assumes that the finance charge is somehow more important than other required disclosures, that assumption makes sense. The finance charge is the total cost of the loan to the borrower. Although other factors might also be relevant, cost would likely be of prime importance to most reasonable consumers shopping for loans.
>
> Since Ford's retention of unearned interest resulted in non-disclosure of the proper

> finance charge on the second loan, since any understatement of the finance charge is material under our precedents, we reverse the district court's grant of summary judgment for Ford and remand for further proceedings consistent with this opinion.

Id. at 1018-1020. The court noted that although footnote 41 did not govern the Ford loan, the court "would likely reach the same result if they (the footnote) did apply since the finance charge for the loan was understated by more than $10.00". Id. at 1019. Therefore, the disclosed finance charge is not accurate, and GREAT WESTERN has violated TILA. See also, Gallegos v. Stokes, 593 F.2d 372 (10th Cir. 1979) (accepting the findings of the trial court that the disclosure provisions of TILA were violated by overstating the finance charge by $28.96, as well as by overstating the annual percentage rate and the monthly payment).

GREAT WESTERN cites the Federal Reserve Board's Truth-in-Lending Policy Guide ("Policy Guide") for the proposition that if the finance charge is misstated because the APR is misstated, and the APR deviation is within the tolerable limits allowed by TILA, then the misdisclosure of the finance charge is not a violation of TILA. The Policy Guide defines "Understated Finance Charge" as follows:

> "Understated finance charge" means a disclosed finance charge which, when increased by a numerical tolerance that is generated by the corresponding APR tolerance is less than the finance charge calculated under the Act.

Footnote 1 to this definition provides as follows:

> Finance charge tolerance: The finance charge tolerance for each loan will be generated by the corresponding APR tolerance applicable to

> that loan. For example, consider a single-payment loan with a one year maturity which is subject to a one quarter of one percent APR tolerance. If the amount financed is $5,000.00 and the finance charge is $912.50, the APR will be 18.25%. The finance charge generated by the APR of 18% on that loan would be $900.00. The difference between $912.50 and $900.00 produces a numerical finance charge tolerance of $12.50. If the disclosed finance charge is not understated by more than $12.50, reimbursement would not be ordered.

The Policy Guide, promulgated pursuant to 15 U.S.C. §1607, is used to determine if restitution is appropriate when the finance charge is understated in cases in which "the Federal Reserve Board acts on its own initiative ... as a policeman over its member banks." Ratner v. Chemical Bank New York Trust Company, 309 F.Supp. 983, 986 (S.D. N.Y. 1969). It does not apply when a private party, pursuant to 15 U.S.C. §1640, brings a civil action for damages or rescission under TILA. The Policy Guide does not state that the finance charge disclosure is "accurate" if it is within the numerical tolerance generated by the corresponding APR tolerance; it merely states that restitution is not appropriate in such cases. Therefore, because Footnote 41 of Regulation Z, §226.18(d) is the proper measure of accuracy, this court should rule that GREAT WESTERN violated TILA when it misdisclosed the finance charge by $201.84, the total of payments by the same amount, and the payment amount for the last 348 payments listed on the payment schedule by $.58 cents.

(4) Use of Estimates

GREAT WESTERN placed an asterisk following the TILA numbers in the annual percentage rate disclosure, the finance charge disclosure, the amount financed disclosure, the total of payments disclosure, and the payment schedule disclosure of 348 payments at $755.23. The disclosure statement indicates that: "* MEANS ESTIMATE." The BEACHES assert that GREAT WESTERN misdisclosed the variable rate feature by disclosing those figures as estimates which violated TILA. Section 226.17(c)(2) of Regulation Z states:

> (c) Basis of disclosures and use of estimates.
>
> (2) If any information necessary for an accurate disclosure is unknown to the creditor, it shall make the disclosure based on the best information reasonably available and shall state that the disclosure is an estimate.

With respect to variable rate transactions, paragraph 17(1)-9 of the Official Staff Commentary to §226.17 provides as follows:

> 9. Use of estimates in variable rate transactions.
>
> The variable rate feature does not, by itself, make the disclosures estimates.

The BEACHES assert that GREAT WESTERN erred in labelling the numerical disclosures as estimates because a lender cannot label those numerical disclosures as estimates merely because the parties have entered into a variable rate transaction. GREAT WESTERN correctly cites In re: Jones, supra, for the proposition that disclosing figures as estimates does not violate TILA when the disclosure statement contains the actual figures. However, as indicated above, both parties agree that some of the disclosed figures were inaccurate (overstated). Therefore, this case is

distinguishable from Jones. Where actual figures are available, and the lender discloses estimated or incorrect figures, the lender violates TILA. See, In re: Mitchell, 75 B.R. 593 (Bankr. E.D. Pa., 1987). Therefore, because GREAT WESTERN inaccurately portrayed the payment schedule, the annual percentage rate, the finance charge, the amount financed, and the total of payments as estimates, GREAT WESTERN violated TILA.

(5) Dollar Signs

The BEACHES cite Flesher v. Household Finance Corp., supra, for the proposition that the failure to use dollar signs in the payment schedule violates the "clear and conspicuous" rule. However, Flesher is distinguishable from the instant case because the lender in Flesher failed to include a dollar sign before the "default and deferment charge". Because of this omission, the borrower could have interpreted the amount disclosed as a percentage or some other charge. As a result, "plaintiffs did not know the charges to be paid upon their default or deferment under th[e] loan agreement." Id. at 862. In this case, it is clear that the "765.46" and "755.23" mean "$765.46" and "$755.23", especially in light of the fact that these numbers were in the "Amount of Payments" column. Therefore, GREAT WESTERN did not violate the "clear and conspicuous rule of TILA" by failing to place dollar signs in the payment schedule.

(6) Intangible Tax

The BEACHES contend that GREAT WESTERN misdisclosed the amount financed by improperly including the intangible tax in the amount financed and excluding the sum from the finance charge. Therefore, GREAT WESTERN violated TILA by overstating the amount financed and understating the finance charge. Regulation Z, §226.4(a) defines "Finance Charge" as follows:

> The finance charge is the cost of consumer credit as a dollar amount. It includes any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or condition of the extension of credit. It does not include any charge of a type payable in a comparable cash transaction.

The intangible tax on the mortgage is clearly a "charge ... imposed ... as an incident to or a condition of the extension of credit." If the BEACHES paid for the property in full with cash, the tax would not be charged to the BEACHES because there would be no mortgage. Thus, it is not a "charge of a type payable in a comparable cash transaction." Furthermore, the Official Staff Commentary to §226.4(a) states:

> 1. Charges in comparable cash transactions. Charges imposed uniformly in cash and credit transactions are not finance charges. In determining whether an item is a finance charge, the creditor should compare the credit transaction in question with a similar cash transaction. A creditor financing the sale of property or services may compare charges with those payable in a similar cash transaction by the seller of the property or service. For example, the following items are not finance charges:

> Taxes, license fees, or registration fees, paid by both cash and credit customers. (Emphasis added).

This comment supports the conclusion that the mortgage intangible tax is a finance charge because the tax would not be incurred by a cash buyer.

GREAT WESTERN cites Regulation Z §226.4(e)(1) for the proposition that certain taxes and fees paid to public officials for perfecting the security interest can be excluded from the finance charge. §226.4(e)(1) provides as follows:

> (e) Certain Security Interest Charges.
>
> If itemized and disclosed, the following charges may be excluded from the finance charge:
>
> (1) Taxes and fees prescribed by law that actually are or will be paid to public officials for determining the existence of or for perfecting, releasing or satisfying a security interest.

The Official Staff Commentary to that section states:

> 4(e) Certain Security Interest Charges
>
> 1. Examples: Examples of charges excluded from the finance charge under 226.4(e)(1) include:
>
> Charges for filing or recording security agreements, mortgages, continuation statements, termination statements, and similar documents.
>
> Stamps evidencing payment of taxes on property if the stamps are required to file a security agreement on the property.

The payment of the intangible tax is not required to "determin[e] the existence of or for perfecting, releasing, or

satisfying a security interest." The tax is not a "[c]harge for filing or recording" the mortgage. Furthermore, the intangible tax is not a documentary stamp tax. See, 53 FLA. JUR. 2d, Taxation §29:5 (although the same transaction often triggers both taxes, there are distinct differences between the stamp tax and the intangible tax). Therefore, GREAT WESTERN violated TILA because the intangible tax charge of $194.16 was improperly included as part of the amount financed.

B. What Remedies are Available to the BEACHES for Any Violations of the Federal Truth-in-Lending Act?

(1) Introduction

In Smith v. Fidelity Consumer Discount Company, 898 F.2d 896, 898 (3rd Cir. 1989), the Second Circuit succinctly stated the purposes of the Federal Truth-in-Lending Act and the remedies available to consumers for TILA violations:

> Through TILA, Congress sought to remedy the "divergent and often fraudulent practices by which credit customers were apprised of the terms of the credit extended to them." Johnson v. McCrackin-Sturman Ford, Inc., 527 F.2d 257, 262 (3rd Cir. 1975). Indeed, the congressionally stated purpose of TILA is "to assure a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him." 15 U.S.C. §1601(a) ...
>
> TILA achieves its remedial goals by a system of strict liability in favor of the consumers when mandated disclosures have not been made. 15 U.S.C. §1640(a). A creditor who fails to comply with TILA in any respect is liable to the consumer under the statute regardless of the nature of the violation or the creditor's intent. Thomka v. A.Z. Chevrolet, Inc., 619 F.2d 246, 249-50 (3rd Cir. 1980). "[O]nce the

> court finds a violation, no matter how technical, it has no discretion with respect to liability." Grant v. Imperial Motors, 539 F.2d 506, 510 (5th Cir. 1976).
>
> A single violation of TILA gives rise to full liability for statutory damages. Damages include actual damages incurred by the debtor plus a civil penalty equal to double the finance charge up to a maximum of $1,000.00. 15 U.S.C. §1640(a)(1)(2)(A)(i). Multiple violations of TILA in the course of a single loan transaction do not yield multiple civil penalties but result in only a single penalty. 15 U.S.C. §1640(g).
>
> In addition, when a creditor takes a security interest against property which is the principal dwelling of the debtor, the debtor has the right to rescind the transaction until the later of (1) midnight of the third day following the transaction or (2) the date on which the creditor delivers to the consumer the notice of the right of rescission and the material disclosures that TILA requires. 15 U.S.C. §1635. Exercise of the right to rescind under §1635 results in discharge of the consumer's liability for any finance charge or other charge and in discharge of any security interest taken in conjunction with the extension of creditor. 15 U.S.C. §1635(b).

(2) Rescission

15 U.S.C. §1635 governs the borrower's right to rescind a consumer credit transaction. §1635 provides as follows:

> Disclosure of Obligor's Right to Rescind
>
> Except as otherwise provided in this section, in the case of any consumer credit transaction (including opening or increasing the credit limit for an open-end credit plan) in which a security interest, including any such interest arising by operation of law, is or will be retained or acquired in any property which is used as the principal dwelling of the other person to whom credit is extended, the obligor shall have the right to rescind the

> transaction until midnight of the third business day following the consummation of the transaction or the delivery of the information and rescission forms required under this section together with a statement containing the material disclosures required under the subchapter, whichever is later .... (Emphasis Added).

However, §1635(e)(1) states that:

> This section does not apply to:
>
> (1) a residential mortgage transaction defined in §103(w).

Section 103(w) (15 U.S.C. §1602(w)) defines a "residential mortgage transaction" as:

> a transaction in which a mortgage ... or equivalent consensual security interest is created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling.

The key issue is whether the instant transaction is one in which a mortgage was created to finance the acquisition or initial construction of the consumer's dwelling. Paragraph 2 of the Pretrial Stipulation submitted by both parties provides as follows:

> The proceeds of the loan were used to satisfy a preexisting construction loan from First Federal Savings which was utilized to pay for the construction of the Defendants' primary residence.

In regard to construction loans and permanent financing, paragraph 2(a)(24)-4 of the Official Staff Commentary to §226.2(a) provides in part as follows:

> Construction financing. If a transaction meets the definition of a residential mortgage transaction and the creditor chooses to disclose it as several transactions under §226.17(c)(6), each one is considered to be a residential mortgage transaction even if

> different creditors are involved. For example:
>
> . . . . .
>
> One creditor finances the initial construction of the consumer's principal dwelling and another creditor makes a loan to satisfy the construction loan and provide permanent financing. Both transactions are residential mortgage transactions.

According to the Pretrial Stipulation in this case, First Fidelity financed the initial construction of the BEACHES' home and GREAT WESTERN made their loan to satisfy First Fidelity's construction loan and to provide permanent financing. The staff commentary provides that both loans, the First Fidelity loan and the GREAT WESTERN loan, are residential mortgage transaction. Therefore, the BEACHES are not entitled to rescind the instant loan transaction.

In addition, 15 U.S.C. §1635(f) limits the existence of the right of rescission to three years after the consummation of the mortgage transaction. The BEACHES' failure to raise a rescission claim on or before August 15, 1989, would be absolutely fatal to any right to rescind which they would have had if this were not a residential mortgage transaction exempt under 15 U.S.C. §1635(e)(1). This court is unconvinced by the rationale of Dawe v. Merchants Marine, 683 P.2d 796 (Colo. 1984) and its progeny. Congress' omission in 15 U.S.C. §1635(f) of the recoupment and set-off language contained in 15 U.S.C. §1640(e) clearly establishes the parameters for this court concerning the continued vitality of

any rescission right which may have existed, after the expiration of three years.

(3) Statutory Damages

15 U.S.C. §1640(a)(2)(A) provides for the recovery of statutory damages even for a minor violation of TILA:

> (a) except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under §125, or chapter 4 or 5 of this title, with respect to any person is liable to such person in an amount equal to the sum of - - .....
>
> (2)(A)(i) in the case of an individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under chapter 5 of this title, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100.00 nor greater than $1,000.00; (Emphasis added)

15 U.S.C. §1640(e) provides for a one year statute of limitations for actions seeking civil damages for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action:

> Any action under this section may be brought in any United States district court, or in any court of competent jurisdiction, within one year from the date of the occurrence of the violation. This subsection does not bar a person from asserting a violation of this title in an action to collect a debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by state law. (Emphasis added).

Florida law permits a form of recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. See, Allie v. Ionata, 503 So.2d 1237 (Fla. 1987). Thus, any statutory damages recoverable by the BEACHES are not barred by the statute of limitations.

In this case, the finance charge for the loan transaction exceeded $176,000.00. Therefore the BEACHES are entitled to the maximum amount of damages under the statute, $1,000.00 for GREAT WESTERN's TILA violations.

(4) For Actual Damages

15 U.S.C. §1640(a)(1) provides as follows:

> Civil Liability
> (a) Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this chapter, including any requirement under §125, or chapter 4 or 5 of this title with respect to any person is liable to such person in an amount equal to the sum of --
>
> (1) any actual damage sustained by such person as a result of the failure;

15 U.S.C. §1640(e) provides for a one year statute of limitations for actions seeking civil damages for TILA violations but permits borrowers to affirmatively claim recoupment to offset the lender's debt collection action. Florida law permits affirmative recovery by way of recoupment even though the statute of limitations has expired when the party pleads it defensively rather than as an independent cause of action. See Allie v.

Ionata, supra. Thus, any actual damages recoverable by the BEACHES are not barred by the statute of limitations. Therefore, the BEACHES are entitled to actual damages for GREAT WESTERN's TILA violations.

Actual damages, although recoverable, are difficult to prove especially in class actions. Adiel v. Chase Federal Savings and Loan Association, 630 F.Supp. 131 (S.D. Fla. 1986). In Adiel, the federal district court explained the proof required to recover actual damages:

> To recover actual damages, each member of the class must prove that "he or she would have gotten credit on more favorable terms but for the violation." McCoy v. Salem Mortgage Company, 74 F.R.D. 8, 12 (E.D. Mich. 1976). Relying on McCoy, the court in Vickers v. Home Federal Savings and Loan Association, 62 A.2d 1171 404 N.Y. S.2d 201, 202 (Sup. Ct. 1978) explained the showing necessary for a Plaintiff to recover actual damages under the Act:
>
> > A plaintiff claiming actual damages must establish a causal connection between the inaccurate disclosure and his injury by demonstrating he relied on the inaccurate disclosure and thereby was effectively prevented from obtaining better credit terms elsewhere.
>
> This "but for" operates to effectuate the very purpose of the Truth-in-Lending Act ...

Id at 133.

In Adiel the Plaintiff sought actual damages of the dollar amount of the loan points. The Southern District of Florida refused to award the plaintiffs actual damages, holding that the plaintiffs did not show "that they could have obtained credit on more favorable terms but for the alleged violation of the Act." Id.

The Bankruptcy Court for the Eastern District of Pennsylvania in In Re: Russell, 72 B.R. 855 (Bankr. E.D. Pa. 1987) disagreed with the test for actual damages promulgated in Adiel:

> We acknowledge that some cases have given the statutory provision (15 U.S.C. §1640(a)(1) a narrow reading). In Adiel v. Chase Federal Savings and Loan, 630 F.Supp. 131 (S.D. Fla. 1986); and McCoy v. Salem Mortgage Company, 74 F.R.D. 8 (E.D. Mich. 1976), the courts held that a consumer must prove "detrimental reliance," i.e. that he or she would have gotten credit on more favorable terms but for the violation, to be entitled to a recovery based on 15 U.S.C. §1640(a)(1).
>
> There are several reasons why we believe that such a narrow reading of §1640(a)(1) is in error. First, the entire TILA statute is remedial, disclosure legislation. In analogous federal Securities Exchange Act and Anti-Trust Act disclosure violation cases, the Supreme Court has repeatedly held that actual damages arise upon the Plaintiff's proof that a material disclosure misstatement has been made, irrespective of whether this misstatement actually resulted in conduct in reliance of it. (Citations omitted).
>
> Secondly, a 1980 amendment to the TILA clarified in 15 U.S.C. §1640(b) as follows, suggests the result that the consumer should be awarded, as actual damages, a reduction of undisclosed finance charges ...
>
> Finally, there is language in several TILA class actions which suggest that it is unrealistic and unnecessary for consumers alleging actual damages per 15 U.S.C. §1640(a)(1) to prove "detrimental reliance." ...
>
> In the instant factual setting, it is apparent that the Defendant failed to include either the $1,190.00 "origination fee" or the $300.00 commission" paid to Suburban Financial Services in the finance charge set forth in the Debtor's TILA statement. It is difficult to imagine a more blatant and fundamental violation of the TILA, or one more far removed

> from the technical and practically innocuous TILA violations that this court has determined entitle the consumer to only statutory damages ...
>
> . . . . .
>
> We therefore hold that, having totally failed to disclose $1,490.00 of what were clearly "finance charges" as such on the Debtor's TILA statement, the Defendant is liable to the Debtor for actual damages of $1,490.00 per 15 U.S.C. §1640(a)(1), in addition to $1,000.00 statutory damages pursuant to 15 U.S.C. §1640(a)(2)(A)(i).

Id. at 863-864.

Although these cases seem somewhat irreconcilable, the BEACHES have satisfied the Adiel test and shown that they could have obtained credit on more favorable times but for the alleged violation of the act. If GREAT WESTERN had not overstated the annual percentage rate, the finance charge, the total of payments, and the amount of each of the last 348 payments, they would have received credit on more favorable terms from GREAT WESTERN itself. Therefore, the BEACHES should be awarded actual damages in the amount of the overstated finance charge, $201.84, plus the amount of the intangible tax which was mischaracterized as part of the amount financed, $194.16 for a total of $396.00.

CONCLUSION

GREAT WESTERN committed a number of TILA violations in this loan transaction, including misdisclosure of the annual percentage rate, the finance charge, the total of payments and the amount of each of the last 348 payments. The BEACHES are entitled to

statutory damages in the amount of $1,000.00 and actual damages in the amount of $396.00, for a total damage award of $1,396.00. Therefore, this court shall off-set the amount owed to GREAT WESTERN under the Note by $1,396.00. However, the court will not rescind this transaction because it was a residential mortgage transaction exempt from rescission and the BEACHES failed to seek rescission within the three year time period in which the right to rescind would have existed had this transaction not been exempt.

JUDGMENT

By virtue of the foregoing, it is

ORDERED AND ADJUDGED:

1. Plaintiff, GREAT WESTERN BANK, is due from the Defendants, DAVID R. BEACH and LINDA M. BEACH, $94,678.68 as principal, $19,513.90 as interest, $897.16 as late charges, $5,756.35 for property taxes, less the BEACHES' damages of $1,396.00 making a total of $119,450.09, that shall bear interest at the rate of 12% per year. Attorney's fees and costs shall be added to the total sum due upon a further hearing by this court.

2. GREAT WESTERN holds a lien for the total sum superior to any claim or estate of the Defendants to this cause, on the following described real property located in Palm Beach County, Florida:

> LOT 31, SET-N-SUN, ACCORDING TO THE PLAT THEREOF ON FILE IN THE OFFICE OF THE CLERK OF THE CIRCUIT COURT IN AND FOR PALM BEACH COUNTY, FLORIDA, AS RECORDED IN PLAT BOOK 37, PAGES 143 AND 144.

3. The subject property shall not be sold and Plaintiff shall otherwise not execute on this judgment absent further order of this court.

4. Jurisdiction of this action is retained to enter further orders that are proper, including without limitation, an award of attorney's fees and costs to the Plaintiff, attorney's fees and costs to the Defendants, writs of possession and, if applicable, a deficiency judgment.

DONE AND ORDERED in Chambers, ~~West Palm Beach~~, Palm Beach County, Florida, this ___ day of _____, 1994.

SIGNED & DATED

MAR 23 1994

CIRCUIT COURT JUDGE
Judge Thomas E. Sholts

Copies Furnished:

STEVEN ELLISON, ESQ., Broad and Cassel, 400 Australian Avenue South, Suite 500, West Palm Beach, FL 33401

JAMES A. BONFIGLIO, ESQ., P.O. Box 1489, Boynton Beach, FL 33425

JOSEPH K. STILL, JR., P.A., 1551 Forum Place, Suite 500E, West Palm Beach, FL 33401

orida Rule of Civil Procedure 1.380(2)(C), the order is defec- re because there is no finding of a willful and deliberate disre- ard of the trial court's prior orders. *See Tubero v. Chapnich*, 12 So. 2d 932 (Fla. 4th DCA 1989), *approved*, *Commonwealth ed. Sav. & Loan Ass'n v. Tubero*, 569 So. 2d 1271 (Fla. 1990). the court was exercising its authority under rule 1.200(c) be- use Camerota did not appear at the status conference as ordered the court, a finding that the party's conduct was willful and ontumacious is also necessary. *See Zeigler* v. *Huston*, 626 So. d 1046, 1047 (Fla. 4th DCA 1993). No such finding appears in ie record. If the court based its entry of a default on rule .500(b), the rules required that Camerota be served with notice f application for default because she had already appeared in the ction. The record, however, does not include such a pleading.

In this case, Camerota entered an appearance through her ttorney. She swore under oath that she did not receive any plead- ngs after her attorney advised her that the amended complaint ad been dismissed. Thus, the unrebutted affidavits establish that he never received the second amended complaint nor the order etting the status conference.

Here, the trial court denied the motion to vacate on grounds hat Camerota failed to demonstrate excusable neglect pursuant o rule 1.540(b).[1] Whether the default was entered pursuant to ule 1.200(c), 1.380(2)(C) or 1.500(b) "it is fundamental that in rder to properly enter a default after a party has appeared, no- ice of the intention to enter a default must be served on the par- y." *Zeigler*, 626 So. 2d at 1048.

Certificates of service appear on all relevant pleadings sent to he Pennsylvania address listed in the order granting the motion to withdraw. When documents are mailed to an addressee, there is a presumption of receipt. In *Allstate Insurance Co. v. Eckert*, 472 So. 2d 807, 809 (Fla. 4th DCA 1985), this court explained:

> The rule is that, when something is mailed by a business, it is presumed that the ordinary course of business was followed in mailing it and that the mail was received by the addressee. *Brown v. Giffen Industries, Inc.*, 281 So. 2d 897 (Fla. 1973). To expect evidence as to the individual, actual act of mailing or as to receipt of the mailed item would be "totally unreasonable." *Id.* at 900.

It is thus presumed that the pleadings and orders mailed to Camerota at her Pennsylvania address, which included the motion to withdraw, the order granting that motion and Kaufman's second amended complaint, were received by her. This presumption, however, is not irrebuttable. While a sworn affidavit stating that the filing was not received will not automatically overcome the presumption, such an affidavit will create an issue of fact which must be resolved by the trial court. As explained by the first district in *Abrams v. Paul*, 453 So. 2d 826, 829 (Fla. 1st DCA 1984), where a party seeking to vacate a default judgment has filed supporting affidavits stating that notice had not been received:

> The issue is therefore a factual one requiring the trial court to weigh the evidence and make a determination as to whether the notice was received. . . . Since the record reflects no evidentiary hearing on the issue, and the quoted language from the order, supra, indicates that the trial court's determination was based upon the incorrect premise that the presumption of receipt established by the certificate of service could not, as a matter of law, be overcome by the defendant's sworn statements, we reverse the order of denial and remand the cause to the trial court for determination of the essential fact.

Because Camerota's supporting affidavits are sufficient to create an issue of fact as to the receipt of notice, the trial court was obligated to make its determination only after an evidentiary hearing. Upon remand, the trial court should also make a determination as to the procedural basis for the entry of the default and whether proper procedures pursuant to the Florida Rules of Civil Procedure were followed prior to the entry of the default judg-

concur.)

[1]If the default was entered pursuant to Florida Rule of Civil Procedure 1.500(b), then before setting it aside, the trial court must determine that the party demonstrated excusable neglect, that the party demonstrated due diligence upon learning of the default, and that the party had a meritorious defense. *Gibraltar Serv. Corp. v. Lone & Assocs.*, 488 So. 2d 582, 584 (Fla. 4th DCA 1989). However, this standard of review is not equally applicable to default entered as a sanction or for failure to appear at a status conference. *See Zeigler v. Huston*, 626 So. 2d 1046, 1047 (Fla. 4th DCA 1993).

* * *

Consumer law—Truth in lending—Action to foreclose home mortgage, with defendants asserting affirmative defenses, including right to rescission under federal Truth in Lending Act—Borrower's right to rescind transaction for TILA violations within three years of closing is extinguished after lapse of the three-year period—Because right to rescission dies with lapse of three-year period, defendants could not assert that right as defense in recoupment more than three years after closing—Question certified: Under Florida law, may an action for statutory right of rescission pursuant to Truth in Lending Act, 15 U.S.C. § 1635, be revived as a defense in recoupment beyond the three-year limit on the right of rescission set forth in section 1635(f)?

DAVID R. BEACH and LINDA M. BEACH, his wife, Appellants, v. GREAT WESTERN BANK, Appellee. 4th District. Case No. 94-1049. L.T. Case No. CL 92-6071 AG. Opinion filed January 31, 1996. Appeal from the Circuit Court for Palm Beach County; Thomas E. Sholts, Judge. Counsel: James A. Bonfiglio of James A. Bonfiglio, P.A., Boynton Beach, for appellants. Steven Ellison of Broad and Cassell, West Palm Beach, for appellee.

(WARNER, J.) This is a case of first impression in Florida. The issue presented is whether a consumer has a right to rescind a mortgage on a home, under 15 U.S.C.A. section 1635 of the Truth in Lending Act (TILA), as a defense by way of recoupment to the lender's foreclosure action, when the defense is asserted beyond the three year period set forth in the statute. *See* TILA, 15 U.S.C.A. § 1601 et seq. (West 1982 & Supp. 1995). We hold that under Florida law, a consumer is not entitled to rescind the mortgage transaction and is limited to a damage set-off as provided in TILA.[1]

Congress originally enacted TILA to create disclosure requirements to insure meaningful disclosure of credit terms by lenders so that consumers could determine the reasonableness of a lender's charge. *E.g., Johnson v. McCrackin-Sturman Ford, Inc.*, 527 F.2d 257 (3d Cir. 1975). As part of the statutory requirements, the consumer is given the right to rescind a transaction that results in the creditor taking a security interest in the consumer's principal dwelling. 15 U.S.C.A. § 1635(a). The consumer has an absolute right to rescind the agreement for three business days following the closing of the transaction. *Id.* Rescission may be extended for up to three years if the creditor fails to make all material disclosures to the borrower as required by TILA. 15 U.S.C.A. § 1635(f); Regulation Z, 12 C.F.R. Pt. 226.23(a) (1994) ("Reg. Z"). Exercise of the right to rescind under 15 U.S.C.A. section 1635 results in the discharge of the consumer's liability for any finance and other charges paid by the consumer and in the discharge of any security interest taken in conjunction with the extension of credit. 15 U.S.C.A. § 1635(b); *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir. 1990). Thus, the lender would only be able to collect on the principal of the loan and would lose any security for the collection of the loan.

TILA also provides for money damages for TILA violations. 15 U.S.C.A. § 1640(a)(1)-(2)(A). While there is a one year limitation on the commencement of a cause of action for money damages, the statute specifically provides that as a defense of recoupment or set-off to an action for collection of the debt, a consumer may assert violations of TILA and the damages to which the consumer would be entitled under the statute. 15 U.S.C.A. § 1640(e).

With that brief overview of TILA, we turn now to the facts of this case. The appellants first obtained a mortgage from First Fidelity Savings and Loan for the construction of their residence. The mortgage was not strictly a construction loan mortgage as it reflected a 30-year payout. There was no requirement for conversion to permanent financing in the loan. After completion of the construction, the appellants moved in, made two payments, and then entered into a another loan transaction with the appellee Great Western Bank ("the bank"), the proceeds of which were applied to pay off and satisfy the original mortgage loan. The bank provided appellants with Truth in Lending Act disclosure documents. At the closing, the bank furnished the appellants with the three day notice of their right to rescind. The loan transaction closed in August of 1986.

On December 1, 1991, the appellants defaulted on the loan by failing to make their installment payments. In June 1992, the bank instituted foreclosure proceedings. The appellants raised affirmative defenses to the foreclosure action, including the assertion of their right to rescind and TILA damage claims. In ruling in favor of the bank upon final judgment, the trial court found, alternatively, that based upon certain factual stipulations, the transaction was an exempt transaction not subject to rescission, and also that the failure of the appellants to assert the right to rescind within three years of the closing of the transaction was fatal to the claim. The court then determined the actual damages of $396 and statutory damages of $1,000 to which the appellants were entitled under TILA, set them off against the balance due the bank, and determined that the bank's lien was superior to all other encumbrances. The court did not immediately order foreclosure. From that order this appeal has been taken.

The parties stipulated that the loan from the bank was made to satisfy the original lender's construction loan and to provide permanent financing. A mortgage loan secured to finance the acquisition or initial construction of a residence is exempt from the rescission requirements of TILA. 15 U.S.C.A. §§ 1635(e)(1), 1602(w). The staff commentary to Reg. Z, 12 C.F.R. Pt. 226.2(a), provides that where one creditor finances the initial construction of the residence and another creditor makes a loan to satisfy the construction loan and provide permanent financing, both transactions are residential mortgage transactions within the meaning of the exemption. Reg. Z, 12 C.F.R. Pt. 226, Supp. I, § 226.2, cmt. 2(a)(24)-4 (1994) (Official Staff Interpretations of Regulation Z). Based on the commentary together with the stipulation, the trial court found that both the First Fidelity loan and the bank's loan were residential mortgage transactions and therefore exempt from statutory rescission. On appeal, the appellants note that while the bank was paying off a construction loan, the original lender's loan not only was for construction but included permanent financing. In fact, the original loan partook of more characteristics of permanent financing than construction financing. Moreover, the appellants occupied their home for a few months before applying for the bank loan. Finally, the appellants more or less claim that the bank waived its right to assert an exemption from rescission because the bank in fact gave them that right in their disclosure documents at closing, thus acknowledging that the transaction was not exempt. We tend to agree that the stipulation is not dispositive and that the factual aspects of this transaction indicate that this is not an exempt transaction. However, further discussion of this point is unnecessary because of our other holding.

The Right of Rescission

The appellants contend that they can assert the right of rescission as a defense in recoupment for TILA violations even beyond the three year period of the statute, relying on *Dawe v. Merchants Mortgage and Trust Corp.*, 683 P.2d 796 (Colo. 1984).[2] The trial court rejected the rationale of *Dawe*, determining that Congress's omission of recoupment or set-off in the section providing for that the right of rescission was not a defense in recoupment and that the right expired after three years. We agree for the following reasons.

In 15 U.S.C.A. section 1635(f), Congress provides:

> An obligor's right of rescission *shall expire three years after the date of consummation of the transaction* or upon sale of the property, whichever occurs first . . . .

15 U.S.C.A. § 1635(f) (emphasis supplied). In *Dawe*, the Colorado Supreme Court held that a debtor's demand for section 1635(f) rescission constituted a defense in the nature of recoupment and thus, the debtor was not barred by the three year expiration period. The court relied on *Bull v. United States*, 295 U.S. 247, 55 S. Ct. 695, 79 L. Ed. 1421 (1935), which held that because recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded, it is never barred by the statute of limitations so long as the main action itself is timely. 295 U.S. at 262. However, the recoupment ordered by the Supreme Court was the offset of estate taxes erroneously paid on a transaction, when raised as a defense to a suit by the government for the payment of income taxes on the same transaction. The court viewed the retention of the estate taxes paid to the government through mistake as tantamount to fraud, and the government's retention of those tax payments was unjust and immoral. Recoupment was therefore equitable in nature to prevent an unjust result. In concluding recoupment could be raised as a defense, the Court cited as authority the case of *Williams v. Neely*, 134 F. 1 (8th Cir. 1904). That case emphasized that "recoupment is, in its nature and essence, an equity .... Recoupment is the keeping back of something that is due because there is an equitable reason for holding it." *Id.* at 4-5.

The right of rescission for violations of TILA does not, in our opinion, fall within those equitable reasons required to apply recoupment. Because under section 1640 the borrower is entitled to assert damages as a defense in recoupment, the borrower is compensated for any monies which the creditor may have collected or will collect for violations of TILA. The further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years.

Dawe also suggests that it is necessary to allow rescission as recoupment beyond the three year period, because if it were barred, lenders could avoid the penalties of TILA by waiting three years to sue on the borrowers' default and thereby frustrate the statutory policy. First, we find it unlikely that a lender would hold a loan in default for two or three years without taking action to collect it. Modern banking regulations make this highly unlikely. Regardless of the lender's actions, default on the note by the borrower is the triggering event of any suit to foreclose on the security interest. If the borrower pays on the loan as required, there is no reason for the lender to sue the borrower. Therefore, it is entirely within the control of the borrower as to whether the creditor has the ability to foreclose on its security interest in the residence. The buyer could bring a direct claim during the first three years, and after that time, merely by defaulting on the mortgage and forcing a foreclosure action, the buyer could also secure rescission by way of recoupment. Thus, by using recoupment as a method of asserting rescission, the buyer could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless. For this reason, we do not find that *Dawe's* argument that lenders could take advantage of the claim is persuasive. Borrowers also could take advantage of the creditor by strategically defaulting and asserting rescission as a recoupment defense.

Whether one may agree with *Dawe* or not, the ultimate question is whether as a matter of Florida law, the defensive assertion of rescission should be allowed. The appellants argue that *Allie v.* [illegible] 592 So. 2d 1227 (Fla. 1987), permits the assertion of

lie recognized the basic rule that recoupment may be asserted en though the underlying claim is barred by the applicable tute of limitations as an independent cause of action. It further ld that once a party files an affirmative action, the defendant ay assert any affirmative defense or compulsory counterclaim hich stems from the same transaction. *Id.* at 1240. *Allie* addressed a claim barred by a statute of limitations, which bars not e right, but the remedy. *Id.*

As explained later in *Rybovich Boat Works, Inc. v. Atkins*, 585 o. 2d 270 (Fla. 1991), the holding of *Allie* "rested primarily on onsiderations of public policy and fairness as well as an analysis f the purpose of statutes of limitation." *Id.* at 271. *Allie* considred the application of limitations to claims for damages at comon law. *Rybovich*, on the other hand, refused to permit the ssertion of a time-barred claim for specific performance of a eal estate contract as a defense to an action for damages under he contract, noting the adverse consequences on the free alienbility of title through the resurrection of a barred specific performance claim. In the instant case, the bank points out that in its eport to Congress on Truth In Lending in January 1972, the Board recommended that a limitation on the right to rescind be established because the title to residential real properties may become clouded by the uncertainty regarding the right of rescission. *Board of Governors of the Federal Reserve System, Annual Report to Congress on Truth In Lending for the Year 1971*. That limitation was eventually enacted as section 1635(f).

The three year limitation contained within section 1635(f) is not a limitation on the remedy, but an expiration of the right after three years from the date of the closing of the transaction. In *Bowery v. Babbit*, 99 Fla. 1151, 128 So. 801 (Fla. 1930), the court noted a general rule of construction:

> [W]here a statute confers a right and expressly fixes the period within which suit to enforce the right must be brought, such period is treated as the essence of the right to maintain the action, and that the plaintiff or complainant has the burden of affirmatively showing that his suit was commenced within the period provided. [citations omitted]. In other words, when the right and the remedy are created by the same statute, the limitations of the remedy are treated as limitations of the right.

Id. at 1163, 128 So. at 806 (citations omitted). Our court followed that rule in *Fowler v. Matheny*, 184 So. 2d 676 (Fla. 4th DCA 1966), in construing a limitation period contained within the Uniform Sale of Securities Law:

> F.S.A. § 517.21 created an entirely new right of action that did not exist at common law and expressly attached thereto, without any exception, the proviso that the action must be brought within two years from the date of sale [of securities]. Such a limitation of time is not like any ordinary statute of limitation affecting merely the remedy, but it enters into and becomes a part of the right of action itself, and if allowed to elapse without the institution of the action, such a right of action becomes extinguished and is gone forever.

Id. at 677; *see also Special Disability Trust Fund v. Southern Bell Tel. & Tel. Co.*, 551 So. 2d 575 (Fla. 1st DCA 1989).

This point was not addressed by *Dawe*, which made the assumption that section 1635(f) was a statute of limitations which barred a remedy as opposed to a special statutory action with its own limitation. However, this assumption is contrary to federal statutory construction principles. In *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957), the court explained the difference in terms much like *Bowery*:

> That this is hornbook law, a reference to 34 Am. Jur. 'Limitation of Actions', Sec. 7, 'Qualifications Annexed to Right of Action' will show: 'A statute of limitations should be differentiated from conditions which are annexed to a right of action created by statute. A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the [illegible] is not a statute

of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right. *Such a provision will control, no matter in what form the action is brought.* The statute is an offer of an action on condition that it be commenced within the specified time. If the offer is not accepted in the only way in which it can be accepted, by a commencement of the action within the specified time, the action and the right of action no longer exist, and the defendant is exempt from liability. . . ." (Emphasis supplied.)

Id. at 704-05. Thus, Florida law and federal law appear consistent as to the proper analysis of this statute.

The right of rescission of a security interest for material violations of TILA disclosures is not a right existing under the common law. It is clearly and only the creation of statute. While the legislature may be without power to abolish common law rights, the legislature may create other rights and impose on them such limitations as it deems advisable. When it does, those limitations form part of the assertion of the right itself. *Bowery*. Here, a borrower has the right to rescind a transaction for TILA violations within three years of closing or until sale of the property. Therefore, based upon *Bowery*, *Fowler*, and *Simon*, that right was extinguished with the lapse of the three year period contained within the statute's terms.

Indeed, one may glean this construction from the very language of the statute itself. "An obligor's right of rescission *shall expire three years after the date of consummation of the transaction* or upon sale of the property, whichever occurs first . . . ." 15 U.S.C.A. § 1635(f) (emphasis supplied). The remedy is not merely barred: the right dies with the lapse of time.[3]

Other portions of TILA also support our construction. Section 1640 provides for damages for TILA violations. While the statute contains a one year limitation for actions for damages, it also specifically provides that despite the limitation, damages may be sought as "defense by recoupment or setoff." Certainly, when Congress intended that recoupment should be allowed, it knew how to say it. *See Russello v. United States*, 464 U.S. 16 (1983) (when Congress includes particular language in one section of a statute and omits it in another section of the same act, it is generally presumed Congress acts intentionally and purposely in disparate inclusion or exclusion). Therefore, if this were a matter of legislative intent, traditional rules of statutory construction would lead us to the conclusion that we cannot infer a Congressional intention to permit rescission beyond three years. Thus, there appears no policy reason apparent in the statute for our court to permit an expired right to be asserted as an equitable defense of recoupment.

A Florida case most closely analogous to the present case is *Devlin v. Aetna Finance Co.*, 379 So. 2d 972 (Fla. 5th DCA), *cert. denied*, 389 So. 2d 1108 (Fla. 1980). In *Devlin*, the creditor had filed suit to recover a debt to which the borrower asserted TILA violations as a common law recoupment defense. At the time the suit was instituted, section 1640 of TILA provided that an action for damages expired one year from the closing of the transaction. There was no extension for recoupment. The county court and then the circuit court sitting in its appellate capacity both determined that the defense could not be asserted beyond the statutory limitation. On petition for writ of certiorari review, the district court found no departure from the essential requirements of law, holding as follows:

> Whether the statutory right to recover twice the finance charges under the Federal Truth In Lending Act may be asserted beyond the one-year statutory limitation is, in our opinion, a legislative decision for Congress. The statute as written provides a one year limitation which we find clear and properly enforceable to bar the recoupment defense here asserted.
>
> Congress well knew that most debtors would become aware [illegible] violations in the Truth In Lending Act only when the

debtor contacts a lawyer to defend a suit on the debt brought by the creditor. The policy decision of whether the penalty of twice the finance charge is an affirmative cause of action or a defense is one best left to the Legislature rather than the courts. Congress presumably enacted the one-year limitation for some reason and they were aware of the realities of consumer credit transactions as indicated above. We are advised by counsel for petitioners that an amendment to the Truth In Lending Act is pending in Congress which would specifically answer the question posed in these cases. We are convinced that the remedy of the petitioners/debtors herein is by a change in the statute.

Id. at 973-74 (citation and footnote omitted). The court was referring to the 1980 amendment which permitted the assertion of damages as a defense in recoupment beyond the one year limitation. As noted before, Congress did not see fit to add the same savings clause to section 1635. The reasoning of *Devlin* is consistent with our analysis.

The appellants point to the policy of the courts that TILA be liberally construed in favor of the consumer to effectuate its remedial purpose. *See Flesher v. Household Fin. Corp.*, 640 F.2d 861 (6th Cir. 1981); *Riggs v. Government Employees Fin. Corp.*, 623 F.2d 68 (9th Cir. 1980). However, as noted in *Riggs*, the courts which have construed the Act as remedial have been concerned with the damage remedies under section 1640. *Riggs*, 623 F.2d at 70. By allowing damages for TILA violations as a claim in recoupment, the lender is penalized for violations and the consumer is entitled to offset the indebtedness either by the borrower's actual damages or by statutory damages, whichever is greater. A liberal construction of TILA does not require the court to add remedies where Congress chose not to permit them, particularly where the alternative remedy of damages is available. To allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment. Under the law of Florida and our construction of TILA, we hold that the statutory right of rescission under TILA expires three years after the closing of the transaction and may not be revived as a defense in recoupment in an action to collect the debt upon the buyer's default.

With respect to the other points raised on appeal, we find that the trial court committed no reversible error, and therefore we affirm the final judgment.[4]

Because this is a question of great public importance, potentially affecting thousands of mortgages in the state, we also certify the following question:

UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635 BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

(DELL, J., concurs. PARIENTE, J., dissents with opinion.)

(PARIENTE, J., dissenting.) The majority concludes that Florida law would not permit a debtor to raise an untimely claim for rescission under TILA as a defense to a mortgage foreclosure action. I disagree and find support for the ability of the debtor to raise the claim defensively in both *Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940).

The majority's rejection of the defensive use of rescission rests on its interpretation of congressional intent. To the extent that the majority's opinion turns on construing congressional intent by reading the provisions of TILA *in pari materia*, it is certainly reasonable, based on a comparison of 15 U.S.C.A. § 1635(f) with 15 U.S.C.A. § 1640(e), to reach a conclusion that Congress intended to cut off the right of rescission after three years, allowing only set-off of damages as a defense in recoupment. *See* Truth in Lending Act, 15 U.S.C.A. §§ 1601-1677 (West 1982 & Supp. 1995).

However, this construction of congressional intent is less reasonable in light of the 1995 amendment, § 1635(i)(3), which provides that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." This amending language, which applies to all consumer credit transactions in existence, runs contrary to an interpretation that Congress intended to treat the right of rescission as governed by a strict statute of repose, precluding the ability of the debtor to raise it defensively. *See James v. Home Constr. Co.*, 621 F.2d 727 (5th Cir. 1980); *Dawe v. Merchants Mortgage & Trust Corp.*, 683 P.2d 796, 798 n.5 (Colo. 1984). *But see Jamerson v. Miles*, 421 F. Supp. 107 (N.D. Tex. 1976), *disagreed with, James*, 621 F.2d at 728; *Fenton v. Citizens Sav.*, 400 F. Supp. 874 (C.D. Mo. 1975). Moreover, § 1635(f) was not part of the original statute, but rather has been described as part of a series of technical amendments designed to improve the administration of TILA.[5] In fact the original version of § 1635, which created the statutory remedy of rescission, had no time limitations.

I would follow the rationale first enunciated in *Dawe* and subsequently adopted by the courts in *FDIC v. Ablin*, 532 N.E.2d 379 (Ill. App. 1988), and *Community National Bank & Trust v. McClammy*, 525 N.Y.S. 2d 629 (N.Y. App. Div. 1988), that the debtor's right to rescind, while barring a claim for affirmative relief after the limitations period has run, is not a bar to asserting that claim as a defense. These courts, however, did not discuss whether the rescission remedy would be applied in a different manner because it was raised defensively. Yet, the *Dawe* court did observe that the debtors did not seek restitution of the installment payments; rather, they sought to avoid liability for future payments on the note. *Dawe*, 683 P.2d at 799.

Part of the difficulty in analyzing this issue has been the use of the concept of rescission by way of recoupment.[6] Although historically the plea of recoupment differed from the plea of set-off in some significant respects, the distinctions between the pleas have been largely eliminated by statute and by rules of modern pleading as explained in some detail by Justice Shaw in *Cherney v. Moody*, 413 So. 2d 866 (Fla. 1st DCA 1982), *adopted*, *Allie*, 503 So. 2d at 1239. Thus, the over-all concept, whether referred to as recoupment, set-off, compulsory counterclaim or affirmative defense, is that a party otherwise barred from instituting an action because of a time limitation was freed from that bar when acting in a defensive posture. *Allie*. The Eleventh Circuit in *Smith v. American Financial Systems*, 737 F.2d 1549, 1552 (11th Cir. 1984), enunciated a three-part test for recoupment: 1) the TILA violation and the creditor's debt arose from the same transaction; 2) the debtor is asserting the claim as a defense; and 3) the main action is timely. All three prerequisites are satisfied here.

The majority views rescission as having inflexible and draconian ramifications for the lender automatically resulting in cancellation of its security interest.[7] Certainly when viewed in this light, rescission varies significantly from the type of claims which could traditionally be pled as a defense in recoupment.

However, § 1635(b) provides that "[t]he procedures prescribed by this subsection shall apply except when otherwise ordered by a court." *See also* 12 C.F.R. § 226.23(d)(4) ("[t]he procedures outlined . . . may be modified by court order"). Rather than creating an inflexible penalty for TILA violations, courts addressing this issue have permitted judicial modification of the statutory rescission process. *See, e.g.*, *Williams v. Homestake Mortgage Co.*, 968 F.2d 1137 (11th Cir. 1992). When viewed as a flexible remedy, a "court may impose conditions that run with the voiding of a creditor's security interest upon terms that would be equitable and just to the parties in view of all surrounding circumstances." *Id.* at 1142. In *Williams*, the bank's request had been to condition voiding of the security interest upon the debtor's return of the loan proceeds:

In deciding whether or not to impose conditions upo[r]

Williams, the district court should consider traditional equitable notions, including such factors as the severity of Homestake's TILA violations and whether Williams has the ability to repay the principal amount. While the goal should always be "to restor[e] the parties to the status quo ante," [citations omitted] rescission must also maintain its vitality as an enforcement tool.

. If rescission can be applied as a flexible equitable remedy, ere appears to be compelling public policy reasons for allowing scission to be pled as a defense in recoupment if otherwise lowed by state law, with the precise method of enforcing the medy left to judicial determination based on the surrounding rcumstances.

If TILA does not expressly preclude a debtor from raising scission as a defensive claim, then the question is whether lorida law otherwise would prohibit it. The majority concludes at Florida law would bar a debtor's right to raise rescission as affirmative defense or compulsory counterclaim. I respectlly disagree.

Florida clearly adheres to the principle that the defense of coupment may be asserted even though the underlying claim is arred by the applicable statute of limitations as an independent ause of action. *See Allie*. In its holding, *Allie* relied on *Beekner*, hich recognized the right of the debtor to raise the defense of sury when a lender sued on a usury-infected contract, even ough the claim of usury as an affirmative cause of action would ave been barred. In *Beekner*, the lender sued to foreclose a ortgage securing notes for a loan. The debtor raised usury as a efense to defeat foreclosure. Our supreme court first pointed to he public policy considerations of allowing the debtor to raise sury, observing that "a contrary holding would enable the lender to purge a usury infected contract by the simple process of waiting the running of the statute of limitations before bringing he suit." *Beekner*, 145 Fla. at 156, 198 So. at 796. The court vent on to explain that:

> This view, regardless of the nicety of pleading is strengthened by the general proposition that a defense should be as long-lived as a cause of action . . . . This rule in law would not be more generous in its effect than a similar one in equity.

Id. at 156-57, 198 So. at 796. The *Beekner* court approved of the use of usury as a shield to defeat recovery, but left unanswered the question of whether the time-barred claim could also be used as a sword to obtain affirmative relief. That question was answered in *Allie*.

In *Allie* our supreme court held that not only could a time-barred claim be raised as a defense, but the claim could be used as a vehicle for obtaining affirmative relief instead of merely defeating recovery. *Allie* concerned a seller who sued for the unpaid balance on the notes for two tracts of land. The buyer then interposed the seller's fiduciary breach and pled recoupment as a defense, requesting restitution and rescission of the contracts for the sale of the land. Our supreme court allowed the defensive claims of rescission and restitution, even though the statute of limitations for rescission of the contract had expired and the buyer would have been unable to institute an action for rescission.

The *Allie* court reasoned that limitation statutes were "designed as shields to protect defendants against unreasonable delays in filing law suits and to prevent unexpected enforcement of stale claims." 503 So. 2d at 1240. However, these purposes are inapplicable when the same claim is raised as a defense:

> A party who seeks affirmative relief, whether through an original complaint or a counterclaim, effectively asserts that he is prepared to prosecute all aspects of that matter. Having sufficient knowledge of the facts to support a complaint and sufficient evidence to prosecute that complaint, he must be prepared to defend against any affirmative defenses arising therefrom. Thus, once a party files an affirmative action, he cannot thereafter profess to be surprised by or prejudiced by affirmative defenses

Id. The holding in *Allie* rested primarily on considerations of public policy and fairness as well as an analysis of the purposes of statutes of limitations.

By permitting an otherwise-expired cause of action to be raised as an affirmative defense or a compulsory counterclaim, *Allie* allowed the defendant to recover an affirmative judgment. Because the defensive claims included restitution and rescission, the holding in *Allie* is particularly applicable to the analysis of what defenses Florida would allow a debtor to raise under TILA in a case arising from the same loan transaction.

Rybovich Boat Works v. Atkins, 585 So. 2d 270, 272 (Fla. 1991), while approving *Allie*, did not extend the defense of recoupment to allow a time-barred action for specific performance of a contract for the purchase and sale of real property. However, our supreme court specifically acknowledged that other remedies available to an aggrieved buyer could include rescission as well as liquidated damages. *Id.* Allowing a debtor to raise a TILA defense to a suit for foreclosure on a mortgage is far closer to *Beekner* where the effect of allowing a time-barred claim of usury was to defeat the foreclosure action and to *Allie* where the court allowed the defensive claims of restitution and rescission.

I also disagree with the majority's reasoning that because the TILA cause of action runs from the date of the incident the principles underlying the defense of recoupment as explained in *Allie* and *Beekner* are rendered inapplicable. Although TILA has created a new statutory cause of action, the remedy of rescission is one derived from the common law. The statute modifies the common law right of rescission and renders it an available remedy for statutory violations of TILA. Also, the cases cited by the majority do not address the issue of whether an expired cause of action could nevertheless be raised defensively. Because the right of rescission is one derived from the common law, I do not see how it could be abrogated without a clear statutory expression of intent to do so—especially in light of the 1995 amendments which added the language stating that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *See James*.

Because there is no question that TILA defenses can be raised and presented to the trial court in a suit for mortgage foreclosure, the controversy is over the extent of the remedy available to rectify violations of TILA arising out of the loan transaction. In my opinion, allowing a defense of rescission in combination with vesting trial courts with the discretion to consider equitable factors before ordering rescission comes closest to effecuating the congressional intent of TILA without running afoul of Florida law.

---

[1]We have reviewed the Truth in Lending Act Amendments of 1995, which the appellants have supplied as supplemental authority. Pub. L. No. 104-29, 109 Stat. 271 (September 30, 1995). Section 8 of the Truth in Lending Act amendments of 1995 addresses rescission rights in foreclosure and amends 15 U.S.C. section 1635. The amendments in part provide that "[n]othing in this subsection affects a consumer's right of rescission in recoupment under State law." *Id.* § 8 (to be codified at 15 U.S.C. § 1635(i)(3)). While we do not analyze whether and to what extent these amendments have retroactive effect, we have analyzed and applied Florida law to resolve the instant case.

[2]*Dawe* has been relied on by other courts, and we recognize that there is a split of authority in the country on this issue. We do not cite or distinguish the other cases because their reasoning is consistent with *Dawe*.

[3]The statute is in the nature of what we term a statute of repose rather than a statute of limitation, as the time period runs not from the borrower's discovery of TILA violations but from the closing of the transaction. As to the distinction between statutes of limitation and statutes of repose, see generally *Kush v. Lloyd*, 616 So. 2d 415 (Fla. 1992).

[4]We note that the trial court found that the bank violated TILA by including the intangible tax as part of the amount financed. We have recently held in *Pignato v. Great Western Bank*, 20 Fla. L. Weekly D2338 (Fla. 4th DCA Oct. 18, 1995), that this is not a violation of TILA. However, the bank did not cross-appeal this issue. Therefore, it has not been preserved for review.

[5]In *James v. Home Construction Co.*, 621 F.2d 727 (5th Cir. 1980), the fifth circuit addressed the issues of whether the newly-enacted three-year statute of limitations should apply prospectively and whether a TILA cause of action [illegible] § 1635(f) was a

limitation on the existence on the substantive right to rescind rather than a true statute of limitations. The court observed:

> The fact that s 1635 is a statutorily created right and not a common law one should make little difference in a consideration of whether or not this cause of action survives. Rather, the key inquiry in a situation like this one centers on what was the Congressional intent in passing s 1635(f). We think it clear that Congress meant to have the statute applied prospectively. First, the Truth-in-Lending Act, a remedial act, has usually been given a broad liberal interpretation since it is assumed that was the intent of Congress. *Listefield v. Walt Flanagan & Co.*, 498 F.2d 1133 (10th Cir. 1974). Second, the Conference Committee report on the Truth-in-Lending Act amendments of which s 1635(f) were [sic] a part, described these amendments as "a series of basically technical amendments designed to improve the administration of the Truth in Lending Act." H.R. Conf. Rep. No.93-1429, 93d Cong., 2d Sess. (1974), U.S. Code Cong. & Admin. News 1974, pp. 6119, 6152.

Id. at 729.

[4]Recoupment was a plea of common law origin arising from the same transaction which did not allow the recovery of an affirmative judgment; whereas setoff—a defense of statutory origin—could arise from a separate transaction and would permit recovery of an affirmative judgment. Modern rules of procedure have largely obliterated the historical distinctions. *See Cherney v. Moody*, 413 So. 2d 866 (Fla. 1st DCA 1982), *adopted*, *Allie v. Ianata*, 503 So. 2d 1237, 1239 (Fla. 1987). For a discussion of the divergent authority between the courts in viewing TILA claims as either pleas of set-off or recoupment, see generally *Smith v. American Financial Systems*, 737 F.2d 1549, 1552-53 (11th Cir. 1984).

[5]In support of this conclusion, the majority cites to the language of § 1635(b) and *Smith v. Fidelity Consumer Discount Co.*, 898 F.2d 896 (3d Cir.), *aff'd in part*, 898 F.2d 907 (3d Cir. 1990).

* * *

Wrongful death—Sovereign immunity—Death occurring in automobile collision after defendant's decedent lost control of his vehicle on I-95 and travelled across the median strip into northbound lane—Department of Transportation was entitled to summary judgment based on sovereign immunity in plaintiffs' action alleging that Department negligently created a known dangerous condition by failing to construct and maintain a barrier dividing northbound and southbound lanes of I-95—Record did not suggest that accident in this case was result of operational level decision regarding design and construction beyond Department's planning level decision to install a median separating northbound and southbound lanes—Order granting plaintiffs' motion for summary judgment as to individual defendant's affirmative defense, which asserted that plaintiffs' damages were caused by Department of Transportation, was not an appealable non-final order

HELEN CYGLER, as Executrix of the Estate of ROBERT P. USA, SR., Deceased, and HELEN CYGLER, as Executrix of the Estate of STACY T. USA, deceased, Appellants, v. JOHN J. PRESJACK, Individually, and as Surviving Spouse and Personal Representative of the Estate of ILLA KIMBERLY PRESJACK, Deceased, JOHN EDWARD PRESJACK, Individually, and as Surviving Minor Child, JOHN EDWARD PRESJACK and ROBERT TAYLOR PRESJACK, By and Through Their Next Of Kin and Guardian/Natural Parent, JOHN J. PRESJACK, and THE FLORIDA DEPARTMENT OF TRANSPORTATION, an Agency of the STATE OF FLORIDA, Appellees. 4th District. Case No. 94-2388. L.T. Case No. 93-2602AB. Opinion filed January 31, 1996. Appeal from the Circuit Court for Palm Beach County; James R. Stewart, Judge. Counsel: Janis Brustares Keyser of Gay Ramsey & Lewis, P.A., West Palm Beach, for Appellant-Helen Cygler. Joe Reiter of Lytal & Reiter, P.A., and Jane Kreusler-Walsh of Jane Kreusler-Walsh, P.A., West Palm Beach, for Appellees-John J. Presjack, John Edward Presjack and Robert Taylor Presjack. Maria A. Mudano and David S. Tadros of Walton Lantaff Schroeder & Carson, West Palm Beach, for Appellee-The Florida Department of Transportation.

(SCHAPIRO, SHELDON M., Associate Judge.) Defendant, Helen Cygler, as executrix of the estates of Robert P. Usa, Sr., and Stacy T. Usa, appeals from final summary judgment in favor of co-defendant, the Department of Transportation ("the Department"). Because we find that the Department was immune from liability under principles of sovereign immunity, we affirm.

On January 18, 1993, Cygler's decedent, Robert P. Usa, Sr., was travelling in a southbound direction on I-95 in Palm Beach Gardens, Palm Beach County, Florida, when he allegedly lost control of his vehicle and travelled across the median strip into the northbound lane colliding with the vehicle driven by decepassengers, John J. Presjack, John Edward Presjack and Robert Taylor Presjack, sustained personal injuries.

As a result, plaintiffs, John J. Presjack, John Edward Presjack, and Robert Taylor Presjack, filed an action for personal injuries and wrongful death against Cygler in her capacity as personal representative of Robert and Stacy Usa. In response, Cygler raised as an affirmative defense that plaintiffs' damages were, in fact, caused by the Department, a third party over which the defendants had no control. Subsequently, plaintiffs amended their complaint to add the Department as a co-defendant in the action, claiming that the Department, by its failure to construct and maintain a barrier dividing the northbound and southbound lanes of I-95, had negligently created a known dangerous condition.

The Department filed a motion for summary judgment, maintaining *inter alia*, that it was shielded from liability by virtue of the doctrine of sovereign immunity. The trial court agreed, and granted summary judgment in favor of the Department. Cygler moved the trial court to enter a final judgment in favor of the Department to enable her to appeal this matter. We affirm.

Generally, within the realm of sovereign immunity, the discretionary, judgmental, planning-level decisions of a governmental entity are immune from suit, while operational level decisions are not. *Department of Transp. v. Neilson*, 419 So. 2d 1071, 1075 (Fla. 1982). With regard to decisions of the Department, as stated by the supreme court in *Department of Transportation v. Konney*, 587 So. 2d 1292, 1294 (Fla. 1991), sovereign immunity attaches to planning decisions, as "decisions concerning the initial plan, road alignment, traffic control device installation, or the improvement of roads and intersections are not matters which would subject a governmental entity to liability, because these activities are basic capital improvements and are judgmental, planning level functions." The supreme court has also held that alleged defects in the construction of the road, the median, and the intersection, are defects in the overall plan of the road and therefore are the result of a planning level function to which absolute immunity attaches. *Ingham v. Department of Transp.*, 419 So. 2d 1081, 1082 (Fla. 1982).

We note, however, that although the overall plan of a road or highway may be a planning level decision immune from liability, the Department may waive sovereign immunity and thus be liable at the operational level where it has created a known dangerous condition. As explained by the supreme court in *City of St. Petersburg v. Collom*, 419 So. 2d 1082, 1085 (Fla. 1982):

> We find that a governmental entity may not create a known hazard or trap and then claim immunity from suit for injuries resulting from that hazard on the grounds that it arose from a judgmental, planning-level decision. When such a condition is knowingly created by a governmental entity, then it reasonably follows that the governmental entity has the responsibility to protect the public from that condition, and the failure to so protect cannot logically be labelled a judgmental, planning-level decision. . . [I]t is only logical and reasonable to treat the failure to warn or correct a known danger created by government as negligence at the operational level.

Cygler contends that the Department waived sovereign immunity in this case by negligently maintaining I-95 at the location of the accident in such a condition so as to create a trap or dangerous condition not readily apparent to travellers on that highway. As support she cites *Ferla v. Metropolitan Dade County*, 374 So. 2d 64 (Fla. 3d DCA 1979), *cert. denied*, 385 So. 2d 759 (Fla. 1980). In that case, it was alleged that the actual design and construction of a median strip on a highway caused a car accidentally coming into contact with it to become airborne. The court held that the design decision, made after the initial planning-level decision to construct a median, is an operational decision not immune from liability. In reaching this conclusion, the court stated that:

> [t]he determination of the precise configuration of the media

reflect this requirement. *See Amendments to Florida Rules of Criminal Procedure*, 21 Fla. L. Weekly S518, S519 (Fla. Nov. 27, 1996). In the instant case, however, the court's failure to conduct a *Huff* hearing was harmless because no evidentiary hearing was required and relief was not warranted on the motion.

Groover's final claim involves the trial court's dismissal of his amended postconviction motion. The court based the dismissal on several grounds, including the fact that Groover failed to verify the amended motion under oath as required by rule 3.850. *See* Fla. R. Crim. P. 3.850 (c) (motion shall be under oath). Contrary to Groover's argument, rule 3.850 requires that *all* motions be verified, even where the motion amends a previously filed verified motion. Failure to meet the oath requirement warrants dismissal of the motion without prejudice. *Anderson v. State*, 627 So. 2d 1170, 1171 (Fla. 1993). Thus, we find no error in the trial court's dismissal of Groover's unverified amended motion.

Accordingly, we affirm the trial court's denial of Groover's motion for postconviction relief and dismissal of his amended motion.

It is so ordered. (OVERTON, SHAW, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur.)

[1]As noted above, Groover has already received a life sentence for the Sheppard murder, as Parker did upon resentencing. Thus, there is no disparity in these sentences.

* * *

Consumer law—Truth in lending—Mortgage foreclosure action with defendants asserting rescission right as defense in recoupment for Truth in Lending Act violations—Action for statutory right of rescission pursuant to TILA cannot be revived as a defense in recoupment beyond the three-year limit on right of rescission contained in 15 U.S.C.A. section 1635(f)—Statutory right of rescission is extinguished three years after transaction's closing

DAVID R. BEACH, et ux., Petitioners, v. GREAT WESTERN BANK, etc., Respondent. Supreme Court of Florida. Case No. 87,835. February 13, 1997. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. Fourth District - Case No. 94-1049 (Palm Beach County). Counsel: James A. Bonfiglio, Boynton Beach, for Petitioners. Steven Ellison of Broad and Cassel, West Palm Beach, for Respondent.

(PER CURIAM.) We have for review *Beach v. Great Western Bank*, 670 So. 2d 986 (Fla. 4th DCA 1996). We accepted jurisdiction to answer the following question certified to be of great public importance:[1]

> UNDER FLORIDA LAW, MAY AN ACTION FOR STATUTORY RIGHT OF RESCISSION PURSUANT TO THE TRUTH IN LENDING ACT, 15 U.S.C.A. SECTION 1635, BE REVIVED AS A DEFENSE IN RECOUPMENT BEYOND THE THREE-YEAR LIMIT ON THE RIGHT OF RESCISSION SET FORTH IN SECTION 1635(f)?

670 So. 2d at 994.

For the reasons expressed below, we answer the certified question in the negative and approve the Fourth District's decision. We find the majority's opinion persuasive and well-reasoned. The dissent is equally cogent; however, we believe the cases relied upon therein simply use the inappropriate analysis for statutory rescission by equating the expiration period with a statute of limitations. Nevertheless, we commend both the majority and the dissent for their thoughtful and comprehensive examination of the issue before us.

MATERIAL FACTS

Petitioners David and Linda Beach (the Beaches) obtained a bank mortgage to finance their home construction in 1985. The loan was a hybrid construction/home loan mortgage as it reflected a thirty-year payout. *Beach v. Great Western Bank*, 670 So. 2d 986, 989 (Fla. 4th DCA 1996). Upon completion of construc- Western) in August 1986. The Beaches used those loan proceeds to pay off and satisfy the initial loan. *Id.* at 989. Great Western provided the Beaches with Truth in Lending Act (TILA), 15 U.S.C. §§ 1601-1667 (1994), disclosure documents and, at the closing, notified them of their absolute right to rescind the agreement within three business days following the transaction.[2]

Five years later on December 1, 1991, the Beaches defaulted on their mortgage after failing to make their installment payments. 670 So. 2d at 989. Subsequently, Great Western instituted a foreclosure action in June 1992. In response, the Beaches raised several affirmative defenses, including their right to rescind and TILA damage claims. The basis of the Beaches' rescission claim was several overstatements made by Great Western on the disclosure documents. The trial court found that Great Western overstated the Beaches' monthly mortgage payment by fifty-eight cents ($.58), resulting in a $201.84 overcharge. The court also found that Great Western overstated the finance charge by $7.24 ($176,519.21 rather than $176,511.97). The trial court ruled for Great Western on the rescission issue, finding that the loan was an exempt transaction not subject to rescission,[3] and that the Beaches' failure to assert their rescission right within three years of closing precluded their claim. 670 So. 2d at 989. However, the trial court awarded the Beaches $396 in actual damages and $1000 in statutory damages as provided by TILA[4] to remedy the overstatements, set them off against the balance due Great Western, and found Great Western's lien superior to all other encumbrances. 670 So. 2d at 989.

On appeal to the Fourth District, the Beaches contended that they could assert their rescission right as a defense in recoupment for TILA violations even beyond the three-year period fixed by the statute. *Id.* at 990. The district court disagreed, concluding that recoupment is primarily an equitable remedy designed to prevent unjust enrichment. *Id.* Recognizing that the statute already provides borrowers a right to assert damages as a defense in recoupment, the court deemed the further remedy of rescission as a penalty provision to creditors and further noted that the rescission right was purely a creation of the statute itself and that statute specifically fixed a time limitation on the right. *Id.* at 990-93. Consequently, the district court affirmed the trial court's final judgment, holding that under Florida law the statutory right of rescission in TILA expires three years after the transaction closing date and may not be revived as a defense in recoupment to a creditor's foreclosure action. *Id.* at 993. Finally, recognizing the potential significance of its decision to thousands of other Florida borrowers, the district court certified the above question for our review. *Id.* at 994.

LAW AND ANALYSIS

As the district court acknowledges, there is a "split of authority in the country on this issue," *Beach*, 670 So. 2d at 990 n.2, over whether the right of rescission may be asserted as a defense to recoupment for TILA violations beyond the statute's three-year expiration period. We begin our analysis with an overview of TILA and the relevant caselaw.

In 1968, Congress enacted TILA with the broad purpose of ensuring "a meaningful disclosure of credit terms so that the consumer will be able to compare more readily the various credit terms available to him and avoid the uninformed use of credit." *See* 15 U.S.C. § 1601(a)(1994). As part of the Act, Congress provided the consumer with the absolute right to rescind the secured transaction within three business days following closing for any reason, and up to three years from the date of closing date if the creditor failed to make all material disclosures. Section 1635(f) of 15 U.S.C. (1994), expressly provides: "An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first . . . ." When a borrower exercises his or her right to rescind in either of the above circumstances, he or she

The end result is that the lender can only collect on the loan principal and loses any security for the loan's collection. *Beach*, 670 So. 2d at 989.

TILA also provides for actual and statutory damages in section 1640(a). Furthermore, while section 1640(e) includes a one-year statute of limitations, it also specifically "does not bar a person from asserting a violation . . . in an action to collect the debt . . . as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law." This savings clause is only found in this section relating to damages; no corresponding clause accompanies the expiration of the statutory right of rescission in section 1635.

Congress also recognized that the complexity and variety of credit transactions precluded comprehensive regulation by a single statute. Accordingly, it delegated extensive authority to the Federal Reserve Board to implement regulations governing commerce in credit. 15 U.S.C. § 1604(a). In this case, the result was Part 226 of Title 12 of the Code of Federal Regulations, better known as Regulation Z. *Selected Commercial Statutes* 1543 (West Publishing Co., 1995 ed.).

The United States Supreme Court has stated that "deference is especially appropriate in the process of interpreting the Truth in Lending Act and Regulation Z." *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555, 565 (1980). Administrative expertise in this highly technical area should be recognized "[u]nless demonstrably irrational." *Milhollin*, 444 U.S. at 565. While an agency's interpretation of its own regulations has traditionally been accorded considerable respect, *see Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945), deference is all the more appropriate in this case as "Congress has specifically designated the Federal Reserve Board and staff as the primary source for interpretation and application of truth-in-lending law." *Milhollin*, 444 U.S. at 566. Thus, any analysis of a TILA issue should include Regulation Z and the Official Commentary thereto, *see Anderson Bros. Ford v. Valencia*, 452 U.S. 205, 219 (1981), in addition to the statute's plain language.

Regulation Z treats the right of rescission as follows:

> The consumer may exercise the right to rescind until midnight of the third business day following consummation, delivery of the notice required by paragraph (b) of this section, or delivery of all material disclosures, whichever occurs last. If the required notice or material disclosures are not delivered, the right to rescind shall expire 3 years after consummation, upon transfer of all of the consumer's interest in the property, or upon sale of the property, whichever occurs first. In the case of certain administrative proceedings, the rescission period shall be extended in accordance with section 125(f) of the Act.

12 C.F.R. § 226.23(a)(3) (1996) (footnote omitted).

Similarly, the Official Staff Commentary concisely states that "the right to rescind automatically lapses on the occurrence of the earliest of the following three events: [t]he expiration of 3 years after consummation of the transaction . . . . " 12 C.F.R. § 226.23, para. 23(a)(3)3. (Supp. I 1996). Likewise, as previously noted, the statute itself provides:

> An obligor's right of rescission shall expire three years after the date of consummation of the transaction or upon sale of the property, whichever occurs first
>
> . . . .

15 U.S.C. § 1635(f) (1994). In conjunction, these three authorities reflect Congress's intent regarding rights of rescission under TILA. Their clarity and plain meaning support the majority opinion below.[6] However, that does not end our inquiry.

In Florida, "[i]t is well established that the defense of recoupment may be asserted defensively where the underlying claim is barred by the statute of limitations." *Willoughby v. Dowda & Fields, Chartered*, 643 So. 2d 1098, 1099 (Fla. 5th DCA 1994) (on rehearing); *see also Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1st DCA 1987); *Merchants Mortgage & Trust Corp.*, 683 P.2d 796 (Colo. 1984),[7] a case the Beaches and the dissent below rely upon.

In *Dawe*, the Colorado Supreme Court held that the borrower's demand for rescission was a defense in the nature of recoupment and was not barred by section 1635(f)'s three-year expiration period. However, as noted by the district court, the *Dawe* court simply assumed that section 1635(f) was a statute of limitations which precluded a remedy, rather than a statute which created the right and the remedy, and included its own expiration period. *Beach*, 670 So. 2d at 992.

Moreover, the borrowers in *Dawe* defaulted less than a year after consummating their loan, well within TILA's three-year rescission window. However, the creditor did not seek a judgment for the unpaid principal until more than four years later, outside the three-year window. The creditor's apparent bad faith clearly influenced the *Dawe* court as it concluded that if "recoupment claims were barred by the relevant statute of limitations, lenders could avoid the penalties of the Act by waiting, as here, three years or more to sue on the borrower's default, and thereby frustrate the fundamental policy of TILA." 683 P.2d at 801. In short, the *Dawe* court used a statute of limitations analysis and a strong inference of creditor bad faith with which to justify its rescission of the loan agreement beyond the three-year expiration period.

The *Dawe* court also relied on *Bull v. United States*, 295 U.S. 247 (1935) to reach its equitable result. In *Bull*, the Court ordered recoupment as an offset of estate taxes mistakenly paid on a transaction, which had been raised as a defense to an IRS suit for the payment of back income taxes on the same transaction. 295 U.S. at 261. The Court recognized that "[w]hile here the money was taken through mistake without any element of fraud, the unjust detention is immoral and amounts in law to a fraud on the taxpayer's rights." *Id.* Thus, as the district court stated, "[r]ecoupment was therefore equitable in nature to prevent an unjust result." *Beach*, 670 So. 2d at 990. In contrast, the inequities which undoubtedly influenced the decisions in *Dawe* and *Bull* are not present in the case before us.

The Beaches and the dissent below also place great reliance on our decisions in *Allie v. Ionata*, 503 So. 2d 1237 (Fla. 1987), *Rybovich Boat Works v. Atkins*, 585 So. 2d 270 (Fla. 1991), and *Beekner v. L.P. Kaufman, Inc.*, 145 Fla. 152, 198 So. 794 (1940). However, all of these cases addressed statutes of limitation and are thus distinguishable. None of the cases addressed a TILA-type statute where the act created the right and provided a remedy.

In *Allie*, petitioner Allie (Ionata's accountant and financial advisor) sold respondent Ionata several parcels of land whose prices Ionata eventually found (several years later) to be severely overinflated. Ionata stopped making payments and sued for restitution and rescission, alleging fraud and breach of fiduciary duty. In response, petitioner Allie pled the four-year statute of limitations as an affirmative defense and counterclaimed for the unpaid balance on two of the notes. At trial, the jury found Allie not guilty of actual fraud, but did find he *breached his fiduciary duty*. On appeal, the Fifth District found respondent Ionata's action on two of the notes barred by the statute of limitations. Upon review, we held that a counterclaim of recoupment of money damages may be asserted even though the underlying claim itself would have been time-barred if raised as a separate cause of action. *Allie*, 503 So. 2d at 1239-40.

In *Rybovich*, respondent Atkins entered into a land purchase contract in June 1985 with petitioner Rybovich. Atkins never gave Rybovich the required seven-days' advance notice of the closing date. The closing, which could occur no later than December 1987, never took place. In February 1988, the parties exchanged letters each declaring the other in default. Later that month, Rybovich entered into another contract to sell the property to a third party. Upon hearing of the pending sale, Atkins' had an interest in said property. Consequently, the title company would not insure the property against Atkins' claim and the entire transaction failed. Rybovich sued Atkins for breach of contract, tortious interference with the second transaction, and slander of title. Atkins counterclaimed for, among other things, specific performance of the original land sale contract. Rybovich responded that the specific performance claim was barred by the one-year statute of limitations and the trial court agreed.

On certiorari review, the Fourth District relied on *Allie* and quashed the trial court's order. We, in turn, quashed the district court's decision and reinstated the trial court's order, refusing to permit Atkins' assertion of the time-barred claim for specific performance as a defense to Rybovich's damages action. We explained that allowing such a claim "would have the effect of placing a cloud on the title of any real property that was the subject of a failed contract for purchase and sale." *Rybovich*, 585 So. 2d at 271. We noted the harshness of specific performance and recognized that "[a]dequate remedies remain available to buyers . . . . " *Id.* at 272. Those remedies included common law rescission of contracts, not statutory rescission as in this case.

In *Beekner*, petitioner Beekner raised the defense of usury (25% interest rate) in a collection action by respondent Cappel to foreclose a mortgage securing notes for a loan. We considered the question of whether the usury defense provided in section 6942, Compiled General Laws (1927), could be precluded by the two-year statute of limitations included in section 4663, Compiled General Laws (1927). We allowed the usury defense, noting that "a contrary holding would enable the lender to purge a usury-infected contract by the simple process of awaiting the running of the statute of limitations before bringing his suit." *Beekner*, 145 Fla. at 156, 198 So. at 796.

After closely reviewing *Allie*, *Rybovich*, and *Beekner*, we conclude that none of those cases addressed the specific situation found here where a statute simultaneously created a right and its remedy. Furthermore, and just as significantly, the losing party in each of those cases demonstrated bad faith conduct, a factor not present in the case before us. Thus, we find that *Allie*, *Rybovich*, and *Beekner* are not controlling.

Turning to this case, the district court concluded that "[t]o allow the consumer to assert the expired right of rescission in recoupment as a matter of public policy where Congress has not chosen to extend it does not sufficiently provide us with a public policy reason for extending recoupment." *Beach*, 670 So. 2d at 993. Moreover, the district court's rationale further distinguishes this case from *Allie* as that case was decided "primarily on considerations of public policy and fairness as well as an analysis of the purpose of statutes of limitation." *Rybovich*, 585 So. 2d at 271. We also noted that

> [f]undamental fairness required this result in *Allie*. A contrary holding would have authorized plaintiffs to take advantage of technical quirks in the law to file their lawsuits after defendants' counterclaims have become time-barred. Under such a scheme, even the grossest misconduct by the plaintiff could be excluded from the court's consideration. Statutes of limitation are intended to promote fairness, not to encourage this type of misconduct.

Id. Unlike *Dawe* and *Allie*, no such manipulation of technical defenses occurred in this case. On the contrary, we agree with the district court that the real danger is that borrowers "could take advantage of the remedy throughout the entire life of the secured transaction, rendering the statutory limitation meaningless." *Beach*, 670 So. 2d at 991. The Beaches' three-year limit on the right of rescission expired in 1989. They subsequently defaulted in December 1991 and Great Western filed its foreclosure action in June 1992. Great Western exercised its foreclosure rights only after the Beaches failed to meet their obligation. Thus, by making their monthly mortgage payments, the Beaches' had full control over Great Western's "ability to foreclose on its security interest in the residence." *Id.* Furthermore, the Beaches' remedy to the foreclosure action. The savings clause in section 1640 preserved that option beyond the one-year statute of limitations as a "defense by recoupment or setoff."

In contrast, Congress did not include such a savings clause in section 1635 regarding the right of rescission. Indeed, section 1635(f) explicitly provides that *both the right and the remedy expire* three years after the closing date. Thus, as the district court notes, TILA mirrors a statute of repose, not a statute of limitations, 670 So. 2d at 992 n.3, in that it "precludes a right of action after a specified time . . . rather than establishing a time period within which the action must be brought measured from the point in time when the cause of action accrued." *Kush v. Lloyd*, 616 So. 2d 415, 420 (Fla. 1992).

As a general rule, "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Therefore, despite the Beaches' assertion that section 1635(f) should not be given its plain meaning, we read that section as unambiguously expressing Congress's intent to extinguish the statutory right of rescission three years after the transaction's closing.

Similarly, this Court traditionally has avoided "readings that would render part of a statute meaningless." *Unruh v. State*, 669 So. 2d 242, 245 (Fla. 1996); *Forsythe v. Longboat Key Beach Erosion Control Dist.*, 604 So. 2d 452, 456 (Fla. 1992); *Villery v. Florida Parole & Probation Comm'n*, 396 So. 2d 1107 (Fla. 1980); *Cilento v. State*, 377 So. 2d 663 (Fla. 1979). Underlying that caution is our assumption that legislatures do not "enact purposeless and therefore useless, legislation." *Sharer v. Hotel Corp. of America*, 144 So. 2d 813, 817 (Fla. 1962). Furthermore, "[w]hen the legislature has used a term . . . in one section of the statute but omits it in another section of the same statute we will not imply it where it has been excluded." *Leisure Resorts, Inc. v. Frank J. Rooney, Inc.*, 654 So. 2d 911, 914 (Fla. 1995); *see also Florida State Racing Comm'n v. Bourquardez*, 41 So. 2d 87, 88 (Fla. 1949) ("The legislature is presumed to know the meaning of words and the rules of grammar, and the only way the court is advised of what the legislature intends is by giving the generally accepted construction. . . . ").

More precisely, we have long recognized that "when the right and the remedy are created by the same statute, the limitations on the remedy are treated as limitations of the right." *Bowery v. Babbit*, 99 Fla. 1151, 1163-64, 128 So. 801, 806 (1930). In *Bowery*, we emphasized that the "statute limiting the time to bring suit . . . is not regarded as a technical statute of limitations." 99 Fla. at 1164, 128 So. at 807. Therefore, *Bowery* controls our interpretation of TILA under Florida law. As we have detailed, *Allie*, *Rybovich*, and *Beekner* all addressed distinct and separate questions of law and thus we are unpersuaded by the Beaches' and the lower court dissent's extensive citation of those cases.

Consistent with *Bowery*, the Fifth Circuit's opinion in *Simon v. United States*, 244 F.2d 703 (5th Cir. 1957) reflected federal statutory construction principles when it reasoned:

> A statute which in itself creates a new liability, gives an action to enforce it unknown to the common law, and fixes the time within which that action may be commenced, is not a statute of limitations. It is a statute of creation, and the commencement of the action within the time it fixes is an indispensable condition of the liability and of the action which it permits. The time element is an inherent element of the right so created, and the limitation of the remedy is a limitation of the right.

Id. at 704-05 (quoting 34 Am.Jur. *Limitation of Actions* § (1941)); *see also Maahs v. United States*, 840 F.2d 863, 866 n. (11th Cir. 1988) (explaining difference between statutes of limitation and expiration period in Federal Tort Claims Act, which created previously non-existent right to sue government in tort noting under FTCA "very right to sue evaporates after the exp

ration of the stated time"). Thus, as stated in the district court's opinion, "Florida law and federal law appear consistent as to the proper analysis of this statute." *Beach*, 670 So. 2d at 992. We agree with the district court's analysis. Therefore, we hold that under Florida law, an action for statutory right of rescission pursuant to 15 U.S.C. § 1635 may not be revived as a defense in recoupment beyond the three-year expiration period contained in section 1635(f).

CONCLUSION

The facts of this case do not compel us to disregard a statute's plain meaning. If "[r]ecoupment is the keeping back of something that is due because there is an equitable reason for holding it[.]" *Williams v. Neely*, 134 F. 1, 5 (8th Cir. 1904), the Beaches' claims have little merit. As the district court stated, "[t]he further remedy of rescission under TILA is a penalty provision to the creditor, not a remedy required by equity and good conscience beyond the statutory period of three years." *Beach*, 670 So. 2d at 990.

Accordingly, we approve the decision below and answer the certified question in the negative.[1] We decline to address the other issues raised by the Beaches which were neither in the district court's opinion nor within the scope of the certified question.

It is so ordered. (OVERTON, GRIMES, HARDING, WELLS and ANSTEAD, JJ., concur. SHAW, J., recused.)

---

[1]We have jurisdiction pursuant to article V, section 3(b)(4) of the Florida Constitution.

[2]TILA also allows rescission up to three years after the transaction if the creditor fails to make all material disclosures to the borrower. This three-year extension, section 1635(f), based upon the lender's bad faith in not disclosing material terms, is the key provision at issue in this case. Material disclosures include the loan's annual percentage rate, the finance charge, the amount financed, the total of payments, and the payment schedule.

[3]"Residential mortgage transactions" are exempt from TILA's rescission requirements. Section 1602 (w) defines these loans as "created or retained against the consumer's dwelling to finance the acquisition or initial construction of such dwelling."

[4]Section 1640 provides for actual and statutory damages and includes a one-year statute of limitations in subsection (e). However, section 1640(e) also contains a savings clause which specifically allows "defense by recoupment or set-off" beyond the one-year statute of limitation.

[5]This is in contrast to common law rescission whereby the rescinding party must first tender the property received under the agreement before the contract is considered void. *See* Joel P. Bishop, *Commentaries on the Law of Contracts* § 833 (Enlarged ed. 1887); *see also Kamerman v. Curtis*, 33 N.E.2d 530 (N.Y. 1941); *E.T.C. Corp. v. Title Guarantee & Trust Co.*, 2 N.E.2d 284 (N.Y. 1936).

[6]Of note, Congress enacted TILA amendments in 1995. Although the new provision does not relate to this case's factual situation, the committee report ("Committee Report Regarding Truth-in-Lending Act Amendments of 1995, Section 113, Rescission Rights in Foreclosure") reiterates the plain meaning of the statute. Specifically, "[t]he consumer protection provisions in this section are intended to benefit consumers that are unable to meet their mortgage obligations and are not intended as a mechanism whereby consumers can avoid their obligations by defaulting and then raising the defense in foreclosure." Furthermore, "[r]escission rights expire in three years. The time period shall not be extended except as explicitly provided in section 125(f) relating to agency enforcement proceedings." That exception does not apply to this case.

[7]Relying on *Dawe*, similar reasoning was used in *Federal Deposit Insurance Corp. v. Ablin*, 532 N.E. 2d 379 (Ill. App. Ct. 1988); *Community National Bank & Trust Co. v McClammy*, 525 N.Y.S. 2d 629 (N.Y. App. Div. 1988); *In re Shaw*, 178 B.R. 380 (Bankr. D. N.J. 1994); and *In re Botelho*, 195 B.R. 558 (Bankr. D. Mass. 1996).

* * *

Criminal law—Sentencing—Guidelines—Sentence combining nonstate sanctions pursuant to 1994 sentencing guidelines is not a departure sentence—Trial court is not required to provide written reasons for such sentence

STATE OF FLORIDA, Petitioner, vs. LEONARD S. PERRY, Respondent. Supreme Court of Florida. Case No. 88,192. February 13, 1997. Application for Review of the Decision of the District Court of Appeal - Certified Great Public Importance. 1st District - Case No. 95-4628 (Duval County). Counsel: Robert A. Butterworth, Attorney General and James. W. Rogers, Tallahassee Bureau Chief, Criminal Appeals, Senior Assistant Attorney General, Tallahassee, for Petitioner. Nancy A. Daniels, Public Defender and P. Douglas Brinkmeyer, Assistant Public Defender, Chief, Appellate Intake Division, Second Judicial Circuit, Tallahassee, for Respondent.

(WELLS, J.) We have for review a decision certifying the following question to be of great public importance:

> IS THE RULE IN *STATE v. DAVIS*, 630 So. 2d 1059 (Fla. 1994), REQUIRING WRITTEN REASONS FOR DEPARTURE WHEN COMBINING NONSTATE PRISON SANCTIONS, APPLICABLE UNDER THE 1994 SENTENCING GUIDELINES?

Perry v. State, 673 So. 2d 557 (Fla. 1st DCA 1996). We have jurisdiction. Art. V, § 3(b)(4), Fla. Const.

We answered this question in *State v. Simmons*, No. 87,618 (Fla. Feb. 13, 1997). There we wrote:

> [T]he 1994 guidelines contain no disjunctive wording and require new interpretation. Florida Rule of Criminal Procedure 3.702(b) contains a clear statement that existing case law, as i construes the application of sentencing guidelines, is superseded by operation of rule 3.702 if the case law conflicts with rule 3.702. We hereby give effect to rule 3.702(b) by holding tha *Davis*, with its emphasis upon disjunctive wording, does nc apply to a sentencing imposed under the 1994 guidelines as em bodied in rule 3.702.

Simmons, slip op. at 4.

Accordingly, we answer the certified question in the negative quash the district court's decision as it relates to combining nor state prison sanctions, and remand for proceedings consiste with this opinion. We decline to review the second cross-appe issue raised by respondent because the issue is unrelated to th certified question upon which this Court's jurisdiction is based.

It is so ordered. (OVERTON, SHAW, GRIMES, HARDING, and ANSTEAD, JJ., concur.)

* * *

MANDATE

SUPREME COURT OF FLORIDA

To the Honorable, the Judges of the:

District Court of Appeal, Fourth District

WHEREAS, in that certain cause filed in this Court styled:

DAVID R.BEACH, et ux. V. GREAT WESTERN BANK, etc.

Case No.: 87,835

Your Case No.: 94-1049

The attached opinion was rendered on: February 13, 1997

YOU ARE HEREBY COMMANDED that further proceedings be had in accordance with said opinion, the rule of this Court and the laws of the State of Florida.

WITNESS the Honorable Gerald Kogan, Chief Justice of the Supreme Court of Florida and the Seal of said Court at Tallahassee, the Capital, on this 2nd day of July, 1997.

Clerk of the Supreme Court of Florida